Petition

83-681

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE DENTICO and DOMINICK D'AGOSTINO,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM M. KUNSTLER
Kunstler & Mason
13 Gay Street
New York, New York 10014
(212) 924-5661

Attorneys for Petitioners

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. _____

LAWRENCE DENTICO and DOMINICK D'AGOSTINO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Questions Presented

1. Whether the deliberate exclusion of women as federal grand jury forepersons violates the equal protection and/or due process guarantees of the Fifth Amendment to the United States Constitution.

2. Whether the exclusion of women as federal grand jury forepersons violates the "impartial jury" clause of the Sixth Amendment to the United States Constitution.

Parties

Lawrence Dentico, Dominick D'Agostino, William M. Musto, Frank Scarafile, John J. Powers, Gildo Aimone, Anthony Genovese, and the United States of America.

Table of Contents

Appendix

Appendix A: Opinion of the Court of Appeals for the Third Circuit in United States v. Aimone, No. 82-5290, et al. (August 25, 1983)

Appendix B: Opinion of the United States District Court for the District of New Jersey in United States v. Musto, 540 F. Supp. 346 (D.N.J. 1982)

Appendix C: Judgment of the Court of Appeals for the Third Circuit in United States v. Aimone

Appendix D: Order of the Court of Appeals for the Third Circuit denying appellants Dentico and D'Agostino's rehearing and refusing suggestion of rehearing en banc

Table of Authorities

Other Authorities

Jurisdictional Statement

The judgment of the Court of Appeals for the Third Circuit was entered on August 25, 1983. A petition for rehearing en banc was denied by order entered on September 19, 1983, and this petition for writ of certiorari was filed 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions Involved

The Fifth Amendment to the Constitution provides, in pertinent part, "No person shall be . . . deprived of life, liberty, or property without due process of law. . ."

The Sixth Amendment to the Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ."

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reproduced in the Appendix hereto ("App") at A. The order of the United States Court of Appeals for the Third Circuit denying petitioners' petition for a rehearing and suggestion of rehearing en banc, unreported, is reproduced at App. D. The opinion of the United States District Court for the District of New Jersey, Sarokin, J., is reported at 540 F. Supp. 346 and is reproduced at App. B.

Statement of Joinder

Pursuant to Supreme Court Rule 19.4, petitioners Dentico and D'Agostino join in the petition for writ of certiorari to be filed or filed by William M. Musto, Frank Scarafile, John J. Powers, Gildo Aimone and Anthony Genovese. The questions to be presented in the petition of

Musto, et al., arose out of a trial in the District Court for the District of New Jersey, where all named parties, among others, were co-defendants. The errors complained of in the petition of Musto, et al., are errors also affecting petitioners Dentico and D'Agostino. The resolution of the questions presented in the petition of Musto, et al., will thus directly affect the interests of petitioners Dentico and D'Agostino.

Pursuant to Supreme Court Rule 19.4, petitioners Dentico and D'Agostino also join, in part, the petition for writ of certiorari filed in United States v. Hobby, 702 F. 2d 466 (4th Cir. 1983), No. 82-2140, on June 29, 1983. Petitioners join so much of that petition that relates to the constitutionality of excluding Black people from the position of federal grand jury foreperson.

Statement of the Case

Lawrence Dentico and Dominick D'Agostino were indicted by a federal grand jury for the District of New Jersey on April 27, 1981. The 36-count indictment, superseded by a 46-count indictment on June 29, 1981, charged petitioners, and all other named parties, with various violations of 18 U.S.C. §§1962(c), 1962(d), 1341, 1343, 1951, 1952, 1962(a) and 1963, thereby giving the District Court for the District of New Jersey jurisdiction over petitioners.

Prior to that trial, petitioner D'Agostino, joined by all other named parties, moved to dismiss the indictment on the grounds, inter alia, that the process of selecting grand jury forepersons and deputy forepersons in the District of New Jersey discriminated against Black people and women, thereby depriving petitioners of rights guaranteed by the Due

Process Clause of the Fifth Amendment to the Constitution of the United States.

On October 30, 1981, a hearing was held before District Judge Sarokin on the questions of whether such discrimination existed, and on the nature and extent of the powers of the grand jury foreperson.

On the basis of that hearing, and upon affidavits submitted by the defense and prosecution, Judge Sarokin made the following findings of fact and conclusions of law relevant to the instant petition:

1. Out of the 25 forepersons and 25 deputy forepersons selected between April, 1976 and July, 1981, two forepersons were female. Since the district's population was 52% female, a prima facie statistical case of discrimination had been made out. Musto, 540 F. Supp. at 357.

2. The position of a federal grand jury foreperson is constitutionally insignificant under the Sixth Amendment to

the Constitution. Id. at 361-362, App. B at 106a.

3. The defendants had no standing, under the equal protection guarantee of the Fifth Amendment, to challenge the exclusion of women from the position of federal grand jury foreperson. Id. at 353, App. B at 66a.

4. The defendants had not properly presented a due process challenge to the foreperson selection process. Id. at 352, App. B at 59a.

The motion to dismiss the indictment was denied. Petitioners Dentico and D'Agostino were convicted of 24 counts named in indictment 81-144.

On appeal, petitioners again challenged the constitutionality of the grand jury selection process, again on equal protection, due process and Sixth Amendment grounds. The Court of Appeals for the Third Circuit did not address the

issue of standing, or whether petitioners properly interposed a due process objection below. Instead, the Court reached the merits of the substantive claims, holding that the duties of the federal grand jury foreperson in the District of New Jersey were purely "ministerial," and that "the selection of one member of a properly constituted grand jury . . . does not, in the context of this case, raise constitutional concerns." App. A at 17a-18a.

Reason For Granting the Writ

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER THE POSITION OF GRAND JURY FOREPERSON IS CONSTITUTIONALLY SIGNIFICANT.

The six Courts of Appeals to consider the constitutional significance of the grand jury foreperson have evenly split over the issue. In Guice v. Fortenberry, 661 F. 2d 496 (5th Cir. 1981), the en banc Court of Appeals for the Fifth Circuit held that purposeful discrimination in the selection of a state grand jury foreperson violated Fifth Amendment guarantees of equal protection and due process, mandating dismissal of the indictment without prejudice. 661 F. 2d at 449. Similarly, in United States v. Perez-Hernandez, 672 F. 2d 1380 (11th Cir. 1982) (per curiam) and United States v. Cross, 708 F. 2d 631 (11th Cir.

1983), the Court of Appeals for the Eleventh Circuit held that purposeful exclusion of Black people and women from the position of federal grand jury foreperson violated the Fifth Amendment. The Cross Court engaged in a scholarly exegesis about the values protected under the Fifth Amendment, concluding, as did this Court in Rose v. Mitchell, 443 U.S. 545 (1979), that discrimination in the grand jury selection process "is especially pernicious in the administration of justice . . . strik[ing] at the fundamental values of our judicial system." Cross, 708 F. 2d at 637, quoting Rose v. Mitchell, 433 U.S. at 555, 556. In addition, the Court of Appeals for the Sixth Circuit, in Mitchell v. Rose, 570 F. 2d 129 (6th Cir. 1978), rev. on other grounds, 433 U.S. 545 (1979), also held that intentional racial or gender-based discrimination in the selection of a

state grand jury foreperson violated a defendant's right to due process of law. Although Mitchell was reversed on other grounds, this Court was careful to note that "we may assume without deciding that discrimination with regard to only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the entire grand jury venire." 433 U.S. at 553, n.4.

On the other hand, the Courts of Appeals for the Third Circuit, United States v. Aimone, No. 82-5290, et al. (August 25, 1983), 3d Cir.), Fourth Circuit, United States v. Hobby, 702 F. 2d 466 (4th Cir. 1983), and Ninth Circuit, United States v. Coletta, 682 F. 2d 820 (9th Cir. 1982), cert. den. 103 S. Ct. 1187 (1983), have all found that the position of grand jury foreperson is without constitutional significance, holding that the foreperson does not have any dispro-

portionate impact on the rest of the venire.

Given the even split among the Courts of Appeals, the fact that no court has changed its position on this issue, and the exceptional importance that this question raises for the administration of justice, this Court should exercise its certiorari jurisdiction.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED IN HOLDING THAT THE POSITION OF GRAND JURY FOREPERSON HAS NO FIFTH AMENDMENT SIGNIFICANCE.

When there is purposeful discrimination in the selection of the grand jury foreperson, the defendant does not have to show prejudice.

The Court of Appeals for the Third Circuit held, inter alia, that the position of federal grand jury foreperson is without constitutional significance because the "duties of the federal foreperson are only ministerial." App. A at 16a. This view misconceives the nature of the

Fifth Amendment's protections against purposeful discrimination, and disregards the plain import of Rose v. Mitchell, 443 U.S. 545 (1979).

Purposeful discrimination against women in the selection of grand or petit juries violates a defendant's right to equal protection of the laws, see, e.g., Rose v. Mitchell, and so taints the integrity of the judicial function as to amount to a deprivation of due process of law. See, e.g., Peters v. Kiff, 407 U.S. 493 (1972). When such purposeful discrimination is shown, trial and appellate courts themselves become parties to violations of the Fifth Amendment.

As far back as Strauder v. West Virginia, 100 U.S. 303 (1879), this Court, addressing the exclusion of Black people from jury service, noted:

> The very fact that colored people are singled out and expressly denied by a statute all

> right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

100 U.S. at 308. More recently, in

Mitchell, this Court held:

> Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the judicial process. The exclusion from grand jury service of Negroes, or any other group qualified to serve, impairs the confidence of the public in the administration of justice. As this Court has repeatedly emphasized, such discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.' Smith v. Texas, 311 U.S. 128, 130 [61 S. Ct. 164, 165, 85 L. Ed. 84] (1940) (footnote omitted). The harm is not only to the accused,

> indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. 'The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.' Ballard v. United States, 329 U.S. 187, 195, [67 S. Ct. 261, 265, 91 L. Ed. 181 (1946)].

433 U.S. at 555.

Since the values being protected are freedom from intentional discrimination and the integrity of the judicial process itself, it can make no difference whether the unconstitutional discrimination infects the entire venire, or only the position of grand jury foreperson. See, e.g., Rose v. Mitchell, 433 U.S. at 533, n. 4; United States v. Cross, 708 F. 2d 631 (11th Cir. 1983); United States v. Perez-Hernandez, 672 F. 2d 1380 (11th Cir. 1982); Guice v. Fortenberry, 661 F. 2d 496, 499 (5th Cir. 1981)(en banc)("If convictions must be set aside because of

taint of the grand jury, we can see no reason to differentiate the result because discrimination affected only the foreman."); Mitchell v. Rose, 570 F. 2d 129 (6th Cir. 1978), rev'd on other grounds, 443 U.S. 545 (1979); United States v. Cabrera-Sarmiento, 533 F. Supp. 799 (S.D. Fla. 1982). Cf. United States v. Eubanks, 591 F. 2d 513 (9th Cir. 1979) (Bias affecting a single juror invalidates verdict).

Strauder and Rose highlight a basic principle of constitutional law--that a defendant need not show prejudice to invalidate an indictment returned by an unconstitutionally selected grand jury. In spite of this, the Aimone court engages in an extensive discussion of whether or not grand jury forepersons in the District of New Jersey have disproportionate impact upon the decision-making process. But this entire discussion is

not relevant to the constitutional significance of the position, at it relates only to whether the defendant suffered actual prejudice from the discrimination. Cabrera-Sarmiento, 533 F. Supp.at 802.

The Mitchell Court emphasized that the motion to dismiss the indictment is the only effective remedy for illegally constituted grand juries, a remedy protecting the defendants and preserving the integrity of the judicial process. 443 U.S. at 558. Indeed, to refuse to dismiss the indictment once intentional discrimination in the venire has been shown is to place the federal courts, the ultimate guarantors of federal constitutional rights, in the position of protecting and aiding such discrimination.

III. THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED IN HOLDING THAT THE POSITION OF GRAND JURY FOREPERSON HAS NO SIXTH AMENDMENT SIGNIFICANCE.

The Sixth Amendment's "impartial jury" clause guarantees criminal defendants the right, inter alia, to be indicted by a grand jury drawn from a group of citizens that is "reasonably representative" of the community as a whole. See, e.g., Duren v. Mississippi, 439 U.S. 357 (1979); Castenada v. Partida, 430 U.S. 482 (1977); Taylor v. Louisiana, 419 U.S. 522 (1975); United States v. Test, 530 F. 2d 577 (10th Cir. 1976). Since the values being vindicated under the Sixth Amendment are "diffused impartiality" and "community participation in the administration of justice," United States v. Jenison, 485 F. Supp. 655, aff'd sub nom, United States v. Perez-Hernandez, 672 F. 2d 1380 (11th Cir. 1982) (per curiam),

there must be a showing that the foreperson exercises disproportionate impact upon the venire. Id. The District Court for the District of New Jersey and the Court of Appeals for the Third Circuit erred in holding that petitioners had not demonstrated that the foreperson had excessive influence on the venire.

The federal grand jury foreperson's duties are not purely ministerial.

The evidence adduced at the evidentiary hearing demonstrated that in the District of New Jersey, the Model Grand Jury Charge, which is read in whole or in large measure by the district judges to grand jurors, lists several of the foreperson's duties through which he/she can exercise disproportionate influence, including leading the discussion as to whether there is enough evidence to return an indictment, and being the first of the grand jurors to question the witness. In

addition, petitioners began a telephonic survey of former grand jury forepersons, inquiring about their perceptions of the foreperson position and their understanding of the foreperson's duties. While the survey was quickly terminated by the District Court, upon motion by the government, three of the 25 forepersons interviewed had explained their own views of their roles in such terms as "mak[ing] sure that no one overstepped their lines," and "coordinat[ing] jury when decisions were made."

At the evidentiary hearing, the trial judges refused to testify as to their selection criteria, but those utilized by other empaneling judges who testified in other cases point out the significance of the foreperson. Those criteria include leadership ability, management experience,

and the "ability of presiding," United States v. Jenison, 485 F. Supp. 655, 665-66 (S.D. Fla. 1979); "the fact that they were in capacities which called for leadership and called for responsibility," United States v. Manbeck, 514 F. Supp. 141, 150 (D.S.C. 1981); and "some sort of ability to lead and make decisions," "a position where he was called upon to make decisions, where he dealt with people and worked with people," "evidence that the individual can handle . . . and control people and control meetings, maintain order," or was "strongest in administrative or leadership ability." United States v. Breland, 522 F. Supp. 468, 472-73 (N.D. Ga. 1981).

In addition, as the court pointed out in United States v. Cross, 708 F. 2d at 637:

> [E]ven if leadership qualities and administrative ability were not considered in the selection

> process, the fact of a person's selection as grand jury foreperson may render the position significant. A foreperson has only one vote on the grand jury, but the selection by the district judge might appear to other grand jurors as a sign of judicial favor which could endow the foreperson with enhanced persuasive influence over his or her peers.

(footnote omitted). Hence, the foreperson does have a disproportionate effect on the deliberative process, and the position cannot be dismissed as only "ministerial."

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

WILLIAM M. KUNSTLER
Kunstler & Mason
13 Gay Street
New York, N.Y. 10014
(212) 924-5661

Attorneys for Petitioners

Dated: New York, N.Y.
October 20, 1983

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 82-5290, 82-5297/98
82-5304/5/6/7, 82-5511/12

UNITED STATES OF AMERICA,

v.

AIMONE, GILDO,
Appellant in 82-5290

UNITED STATES OF AMERICA

v.

DENTICO, LAWRENCE,
Appellant in 82-5297,
82-5511,

UNITED STATES OF AMERICA

v.

D'AGOSTINO, DOMINICK,
Appellant in 82-5298,
82-5512,

UNITED STATES OF AMERICA

v.

MUSTO, WILLIAM V.,
Appellant in 82-5304,

UNITED STATES OF AMERICA

v.

SCARAFILE, FRANK,
Appellant in 82-5305

UNITED STATES OF AMERICA

v.

POWERS, JOHN J.,
Appellant in 82-5306.

UNITED STATES OF AMERICA

v.

GENOVESE, ANTHONY,
Appellant in 82-5307

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Crim. Nos. 81-144-01/02/03/05/06/07/08)

'Argued May 11, 1983

Before: ADAMS and WEIS, Circuit Judges and
VANARTSDALEN, District Judge*
(Opinion Filed August 25, 1983)

William M. Kunstler, Esq. (Argued)
Mark B. Gombiner, Esq.
Kunstler and Mason
13 Gay Street
New York, NY 10014

Attorneys for Appellants Dentico
and D'Agostino

Theodore V. Wells, Jr., Esq. (Argued)
Judy G. Russell, Esq.
Lance D. Cassak, Esq.
Lowenstein, Sandler, Brochin, Kohl,
Fisher and Boylan
65 Livingston Avenue
Roseland, New Jersey 07068

Attorneys for Appellants Musto,
Scarafile, and Genovese and
co-counsel for Appellant Powers

---

* The Honorable Donald W. VanArtsdalen,
United States District Judge for the
Eastern District of Pennsylvania, sitting
by designation.

Joseph A. Hayden, Jr., Esq. (Argued)
Shain, Hayden, Perle, Rafanello
and Schaffer
Gateway I, 18th floor
Newark, New Jersey 07102

Attorney for Appellant Powers

Robert A. Baime, Esq.
Sills, Beck, Cummis, Zuckerman,
Radin and Tishman, P.A.
33 Washington Street
Newark, New Jersey 07102

Attorney for Appellant Aimone

Samuel Rosenthal, Esq. (Argued)
Chief, Appeals Division
W. Hunt Dumont, Esq.
United States Attorney
Federal Building
Newark, New Jersey 07102

Attorneys for Appellee

Alan Ellis, Esq.
1420 Walnut Street
Philadelphia, Pa. 19102

S.A. Guiberson, Esq.
1701 S. Shepherd, Suite 202
Houston, Texas 77019

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers, Inc.

OPINION OF THE COURT

WEIS, Circuit Judge.

Defendants in these consolidated appeals were found guilty of violating the Racketeer Influenced and Corrupt Organizations Act. They contend there was discrimination in the selection of grand jury forepersons and a variance between the conspiracy charged and the evidence at trial. They also challenge the verdict because the trial judge interviewed a juror during deliberations at the suggestion of counsel, and another juror reaffirmed her agreement with the verdict following a recantation shortly after a spectator's emotional outburst in the courtroom. Having considered these and the defendants' other contentions, we find no reversible error and affirm.

After a twenty-one week jury trial, the seven defendants who are appellants in this case were convicted of RICO vio-

lations, conspiracy, mail fraud, and wire fraud. Four of the defendants were found guilty of income tax fraud as well. The jury also returned verdicts of not guilty on nine of the forty-six counts in the indictment. All of the appellant's post-trial motions were denied.

The evidence at trial established to the jury's satisfaction the existence of an enterprise consisting of defendants Lawrence Dentico, Dominick D'Agostino, and Thomas Principe[1], together with the Orlando Construction Company and Rudolph Orlandini. Dentico and D'Agostino supervised and promoted the affairs of the enterprise through their control of the Orlando Construction Company and other entities formed to develop and manage construction projects in Union City and North Bergen, New Jersey. Defendant Genovese assisted the enterprise in his capacity as an architect for the Orlando

[1] Principe is a fugitive and has not been tried.

Company and the related entities.

The other defendants were all public officials. Defendant William Musto was the mayor of Union City and a state senator. Frank Scarafile was the deputy chief of police in Union City and a member of the Board of Education. John Powers was the president of the Union City Board of Education. Gildo Aimone was executive director of the Union City Housing Authority, and John Bertoli[2] held a similar position in North Bergen. These public officials accepted bribes to use their offices and influence in furtherance of the enterprise's affairs. Through their assistance, the enterprise received city construction contracts, tax abatements, and payments on fraudulent work orders. The city officials also cooperated with the enterprise in its attempt to have Union City purchase an office building at a grossly inflated price.

[2] Bertoli was found guilty by the jury, but was granted a new trial.

In 1974, the Orlando Limited Partnership, one of the related entities, began development of the Bella Vista senior citizen housing project in Union City. The enterprise agreed to a $50,000 bribe and actually paid $12,000 to Scarafile so that Musto would arrange for a tax abatement and intercede with the state housing authority. Bribes were also paid to obtain similar treatment for other projects undertaken by the enterprise's related entities.

A $40,000 bribe was paid to Musto, Scarafile and Powers when Orlando Construction Company was awarded contracts to renovate two Union City high schools in 1977. For these projects, Musto instructed the school board attorney to "bend the law a little" because some items were missing on an Orlando Company bid.

In addition, Aimone allowed the company to file a performance bond after the

time originally set and arranged to have all payroll records for the project directed to him. Genovese submitted change orders for work not specified in the contracts and checks were then issued by Aimone. Aimone and Powers also authorized payments for work that was never performed and in some instances double payments were made.

Between 1974 and 1978, the enterprise group participated in a number of other public projects, for which bribes were paid to Musto, Scarafile and Powers. Perhaps because of the size of the bribes, the enterprise was financially unable to complete some of the work. To secure additional funds, Dentico directed Orlandini to invest $300,000 in an office building. The plan was that $200,000 would then be paid to Musto, Scarafile and Powers to arrange a purchase of the building by Union City at the inflated price of $3.1

million. Public opposition to the sale, however, caused the purchase price and bribe to be reduced. Although Scarafile received $75,000 "advance" on the bribe, the sale of the building never took place because of an adverse vote in a referendum. After the election, Orlandini, D'Agostino, Powers and Scarafile agreed that $50,000 of the advance would be returned.

In July 1980, Orlandini agreed to cooperate with the government and surreptitiously tape-recorded a number of conversations with defendants as he tried to recover the $50,000. At the trial, Orlandini spent twenty-six days on the witness stand and was extensively cross-examined by defense counsel. The government also introduced the tape recordings made by Orlandini, as well as a significant amount of documentary evidence, including fraudulent change orders, checks,

and correspondence among defendants. Five defendants took the stand and presented testimony that lasted more than fourteen days. An expert on linguistics also testified for the defense in support of the defendants' theory that Orlandini had orchestrated the taped conversations so that neutral responses would appear inculpatory.

On appeal, defendants raise a variety of issues. Only three merit discussion: the selection of grand jury forepersons, the evidence of a single conspiracy, and the actions of the trial court during jury deliberations and announcement of the verdict. The defendants' other contentions are listed in the appendix.

I

In the district court, defendants challenged the process for selecting grand and petit jurors and grand jury forepersons as being discriminatory on a

variety of grounds, including race, nationality and sex. On appeal, defendants have reduced their contentions to one--the indictment should be dismissed because women were not properly represented as grand jury forepersons in the District of New Jersey.

In addressing this contention, the district court accepted the defendants' allegations that a proportionate number of women had not been appointed as forepersons over a five-year period.[3] The Court

---

[3] The district court found that of the 25 forepersons and 25 deputy chairpersons selected between April 1976 and July 1981, two forepersons and three deputy forepersons were female. A prima facie statistical case was held to have been established because the percentage of women chosen was sufficiently disparate from the district's 52% female population. United States v. Musto, 540 F. Supp. 346, 357-59 (D. N.J. 1982). The government contends that the statistical analysis is flawed because the sample and the time period were both too small, and because the geographic area surveyed was the Newark vicinage rather than the entire district of New Jersey. In light of our resolution on this issue, we express no view on the statistical aspects of the district court's opinion.

concluded, however, that defendants had not established a violation because the foreperson "does not have disproportionate influence in the deliberative process," and therefore the position is constitutionally insignificant. United States v. Musto, 540 F. Supp. 346, 362 (D. N.J.1982).

Fed. R. Crim. P. 6(c) provides that the court shall appoint one of the impaneled grand jurors to act as foreman and one as deputy foreman to act in his absence. The foreman administers oaths, keeps a record of the number of jurors concurring in the finding of an indictment, and signs all indictments. It has been held, however, that the absence of the foreman's endorsement is only a technical irregularity and not fatal to the indictment. Frisbie v. United States, 157 U.S. 160, 163-65 (1895).

The district court concluded that these duties are "purely ministerial"

and that defendants failed to show that a foreperson "has the power to alter the 'unique qualities and characters of the jury's individual members.'" 540 F. Supp. at 362 (citation omitted). The court also observed that each grand jury was selected by a process providing for fair representation of the community.

The Supreme Court has not decided whether grand jury forepersons have such a significant impact on the criminal justice system that discrimination in their selection amounts to a constitutional violation. In Rose v. Mitchell, 443 U.S. 545, 551-52 n. 4 (1979), the Court "assume[d] without deciding that discrimination with regard to the selection of only the foreman" requires that a conviction be set aside. It found, however, that discrimination had not been established.

Rose was a state conviction case. Under Tennessee law, the trial court chose

a foreman from the general population to serve as the thirteenth juror in a body otherwise composed of persons selected by a random process. A foreman served for two years and could be, and often was, reappointed. He was expected to assist the district attorney in investigating crimes, could conduct the questioning of witnesses, and had to sign an indictment for it to be valid. See id at 548 n. 2. It is clear that the Tennessee grand jury foreman was in a position to guide the decision-making process of the grand jury and had substantially greater power than his federal counterpart.

In Rose the Supreme Court assumed only for purposes of that case that the Tennessee foreman had a significant role. In Guice v. Fortenberry, 661 F. 2d 496 (5th Cir. 1981), the Court of Appeals for the Fifth Circuit found, however, that a Louisiana state foreman with less power

did occupy a controlling position, and in United States v. Cross, ___F. 2d ___ (11th Cir. June 30, 1983) (No. 81-7783), the Court of Appeals for the Eleventh Circuit reached the same conclusion with respect to federal grand jury forepersons in the Middle District of Georgia, see also, United States v. Perez-Hernandez, 672 F. 2d 1380 (11th Cir. 1982).

A contrary view on the role of the federal foreperson was expressed in United States v. Hobby, 702 F. 2d 466, 470-71 (4th Cir. 1983) and United States v. Coletta, 682 F. 2d 820, 822-24 (9th Cir. 1982), cert. denied, ___U.S.___, 51 U.S. L.W. 3611 (U.S. Feb. 22, 1983). See also United States v. Holman, 680 F. 2d 1340, 1356 n. 12 (11th Cir. 1982); United States v. Perez-Hernandez, 672 F. 2d at 1388-89 (Morgan, J., concurring). In Hobby, the court noted the substantial differences between grand jury forepersons in Tennessee

and the federal system, and concluded that the federal foreperson's "role is so little different from that of any other grand juror that the rights of the defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection." 702 F. 2d at 471.

We find that the district court here made a realistic assessment of the role of the federal grand jury foreperson. In our view, the duties of the federal foreperson are only ministerial. We acknowledge the contrary conclusion in United States v. Cross, but point out that forepersons in the Middle District of Georgia were found to perform certain functions not exercised by forepersons in the District of New Jersey. Compare Cross, slip op. at 3778, with United States v. Musto, 540 F. Supp. at 359. The differences may be attributable to custom and practice that

have developed in the respective districts. In any event, we are not persuaded that the duties performed by a federal foreperson confer the power to control the decision-making process of the grand jury.

Moreover, we regard it as extremely significant that the Tennessee foreman considered in Rose v. Mitchell was selected from the public at large, whereas the federal foreperson is chosen from among a randomly selected grand jury, and cannot agree with the conclusion in Cross that "this difference is irrelevant." Cross, slip op. at 3778.[4] We conclude that the selection of one member of a properly

4 The court in Cross found that the Tennessee foreman"probably does not have the potential for influence on the grand jury deliberations" because "[h]e does not participate in the grand jury voting process." Cross, slip op. at 3778. That finding was based on reference in Rose, in connection with one of the parties arguments there, to "the nonvoting foreman of the grand jury." 443 U.S. 560. In summarizing Tennessee law on grand juries, however, the Supreme Court stated that "[t]welve members of the grand jury must concur in order to return an indictment. . .

footnote continued on next page.

constituted grand jury to carry out the ministerial duties of foreperson does not, in the context of this case, raise constitutional concerns. Accordingly, we find no error in the district court's denial of the motion to dismiss the indictment.

II

With respect to the RICO convictions, defendants contend the government drafted an indictment that lumped together six unrelated conspiracies. They allege the prosecution sought to confuse the jury by producing massive evidence of diverse and distinct schemes. Part of the problem, they assert, is that the indictment's description of the "enterprise" as "a group

---

footnote continued from preceding page.

[and] [t]he forman or forewoman may be 1 of the 12." Id. at 548 n. 2 (citation omitted.

of individuals and a corporation associated in fact" does not conform to the statutory definition, 18 U.S.C. §1961(4)(1976).[5] They emphasize the statute describes two different types of enterprises--the first being certain designated legal entities; the second "any union or group of individuals associated in fact, although not a legal entity." According to defendants, an enterprise must be in one category or the other, not a combination of both.

This argument is not persuasive. It was rejected in analogous circumstances by the Court of Appeals for the Fifth Circuit in United States v. Thevis, 665 F. 2d 616, 625-26 (5th Cir.), cert. denied sub nom., Evans v. United States, 456 U.S. 1008 (1982). There, the enterprise

---

[5]Section 1961(4) provides:

> "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

was described as "a group of individuals associated in fact with various corporations." The court reasoned that Congress used the word "includes" in the enterprise definition to indicate a non-exhaustive listing of associations and that a broad interpretation was intended. Similar reasoning was applied in United States v. Huber, 603 F. 2d 387, 393-94 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980), where the court recognized that an enterprise could include more than one corporation.

We see no indication that Congress intended to restrict the definition of "enterprise" to a number of entities or individuals that all fall within the same category. The Supreme Court has stated that "[t]here is no restriction upon the associations embraced by the definition" in section 1961(4). United States v. Turkette, 452 U.S. 576, 580 (1980).

Accordingly, we are convinced that a proper statutory enterprise was charged and proved here.

Defendants also argue that the evidence showed more than one conspiracy and thus there was a variance from the indictment. See Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Camiel, 689 F. 2d 41 (3d Cir. 1982). After the present case was tried, this court decided United States v. Riccobene, 709 F. 2d 214 (3d Cir. 1983), where the same issue was raised. There, we agreed with the Court of Appeals for the Fifth Circuit that "a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single 'enterprise' conspiracy.'" Id. at 224-25 (quoting United States v. Southerland, 656 F. 2d 1181, 1192 (5th Cir. 1981), cert. denied 455 U.S. 949 (1982). The "'key element is

proof that the various crimes were performed in order to assist the enterprise's involvement in corrupt endeavors.'" United States v. Riccobene, 709 F. 2d at 224, (quoting Blakey and Goldstock, "'On the Waterfront'" RICO and Labor Racketeering," 17 Am. Crim. L. Rev. 341, 361 (1980).

In the present case, the enterprise undertook construction projects for the enrichment of its members. To promote the projects, defendants committed bribery as well as mail and wire fraud in securing tax abatements, building contracts, public financing, and fraudulent work payments. There was, then, adequate evidence for the jury to find that each of the defendants agreed to conduct, or participate in the conduct of, the enterprise's activities through the commission of predicate offenses. The fact that the jury acquitted on some counts establishes its ability to analyze the conflicting testimony and sort

out that which was relevant to specific charges. As the record supports a finding of a single enterprise conspiracy, there was no variance between the indictment and proof at trial.

III

The points pressed most strongly by defendants grow out of incidents that occurred during the jury deliberations and polling after the verdict was announced.

A.

On the morning of the third day of deliberations, the trial court received a message that Juror No. 9 was upset and crying. She had never been away from her husband in many years of marriage and was distressed at the separation imposed by the sequestered deliberations. After court and counsel discussed the matter, it was agreed without objection by any of the defense lawyers that the judge would

speak to the juror, alone and off the record.

After the meeting, the judge conferred with counsel and gave them a synopsis of his conversation with the juror. The judge reported that the juror was "hysterical because of the pressure of the deliberations. Apparently, the foreperson had insisted that the jurors support their views and indicated that they should do so before going to dinner last night. Apparently that direction upset her very much."

After some comments from the attorneys, the judge stated that he was looking to them for guidance. A number of alternatives were suggested but ultimately all of the defense lawyers agreed that the juror should not be excused. With the consent of all defense counsel, the judge spoke a second time with the juror, again without the presence of a court reporter.

After that discussion, the judge reported to counsel that he had told the juror that he would "have a chat with [the foreman] as to his functions." The judge also read to Juror No. 9 a portion of the charge he would consider giving to the jury as a whole. In response, the juror said she did not wish to continue under any circumstances.

Defense counsel were unable to agree on what should be done at that point, and the court adjourned to a luncheon recess. Upon returning, counsel were informed by the judge that he had met once again with the juror and told her it might be necessary for her to continue serving in the case. The judge said, "She indicated to me that she would be willing to do so."

Counsel praised the judge for his ingenuity in bringing the matter to a head and then proceeded to debate the alternatives. Several of the defense lawyers

moved for mistrial, others wished to have the juror remain, and another requested a hearing. None wanted to substitute an alternate juror or to proceed with eleven jurors.

Counsel then agreed upon language to be used in a supplemental charge to the jury, and a brief voir dire of Juror No. 9 was held in chambers in the presence of counsel and on the record. At that time, the juror responded that she would continue and be impartial. The jury was then called in, given the supplemental instruction on the role of the foreperson in deliberations, and directed to continue deliberating.

Even though defense counsel had agreed during the trial that the judge could talk to the juror informally and off the record, they filed post-trial motions arguing that they had not authorized the third conference and that it should have

been recorded. The district judge rejected this contention, commenting that counsel for one of the defendants "applauded the court for its 'ingenuity'" and three others joined in another defense lawyer's remark that he "'adopt[ed] and support[ed] the procedure involved.'" United States v. Musto, 540 F. Supp. 318, 334 (D. N.J. 1982). Indeed, none of the defendants' trial counsel objected to the court's third meeting with the juror upon learning of it.

The district court found that United States v. United States Gypsum Co., 438 U.S. 422 (1978), was not controlling. By contrast, counsel in the present case had promptly received a report of what had transpired at each meeting with Juror No. 9, and a voir dire examination of the juror had been conducted in the presence of all counsel. In addition, the court observed that the supplementary instruc-

tions to the entire jury had prevented any misapprehension that might have been conveyed by her to the other jurors. On appeal, defendants nevertheless rely on Gypsum in arguing that they had a right to a complete record of each meeting, rather than the judge's summaries.

In Gypsum, the Supreme Court commented that a private meeting between a trial judge and a juror was undesirable, but standing alone was not error. The error in that case arose when the ex parte discussion between the trial judge and the jury foreman drifted into what the Supreme Court construed as a supplemental instruction on the jury's obligation to return a verdict. In addition, since counsel were not aware that the foreman might have been given the impression that a verdict had to be returned in any event, there was no opportunity to seek correction of that misapprehension.

We agree with the district court that there are substantial distinctions between this case and Gypsum. Here, there was a supplemental charge to the jury in open court that avoided the possibility of an instruction being transmitted by one member of the jury to the others. Counsel also had the opportunity to be present at the voir dire of the juror with whom the court met. Nor can we overlook the fact that counsel were eager to have the trial judge meet with the juror to determine the extent of the problem. Indeed, the defense lawyers were enthusiastic in their approval of the trial judge's action; only the prosecution voiced any reservations.

The Gypsum case emphasizes the danger of ex parte communications with jurors and nothing we say here should be construed as encouraging such communications. Nevertheless, when defense lawyers, as a matter of trial strategy, urge the judge to con-

duct off-the-record interviews with a juror in a situation like this, we hold counsel to their obligations to the court. They may not promote action by a trial judge and then assign that compliance as error. "Sandbagging" will not be count-enanced by this court. See United States v. Pecora, 693 F. 2d 421, 425 (5th Cir. 1982), cert. denied ___U.S.___, 51 U.S. L.W. 3883 (U.S. June 13, 1983). Nor is our position altered by the fact that different counsel are chosen to represent the parties on appeal. Trial counsel's actions in this respect are binding on the client and appellate counsel as well. See United States v. Provenzano, 620 F. 2d 985, 997 (3d Cir. 1980), cert. denied 449 U.S. 899 (1981) (noting "longstanding rule that counsel's intentional tactical decisions at trial bind his client.").

Moreover, there is not the slightest indication in this record that the inter-

view with Juror No. 9 in any way influenced the verdict. The conversations between the judge and juror focused on the juror's reluctance to continue and the conduct of the deliberations by the foreman. The juror's willingness to remain was established by the voir dire. The foreman's role in the deliberative process was covered fully in the supplemental instructions given by the trial judge before the jury resumed its deliberations after disposition of Juror No. 9's complaint. These instructions were carefully and exhaustively reviewed with counsel and in final form were approved by all defense lawyers.

We reject as well the defendants' contentions that there should be a post-trial interrogation of the jurors about what they may have been told by Juror No. 9. In these circumstances, that would constitute an unwarranted intrusion into

the jury deliberations. See Fed.R. Evid. 606(b) ("a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations"); Sullivan v. Fogg, 613 F. 2d 465 (2d Cir. 1980); King v. United States, 576 F. 2d 432 (2d Cir.) cert. denied, 439 U.S. 850 (1978); United States v. Eagle, 539 F. 2d 1166 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977); Government of the Virgin Islands v. Gereau, 523 F. 2d 140 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976). In sum, we find no reversible error in the trial court's disposition of the issues with respect to Juror No. 9.

B.

Two days after the incident with Juror No. 9, at about 6:30 p.m., the jury asked for clarification of the evidence on one of the counts. Following consultation with counsel, the court responded to the inquiry. Shortly afterward, the jury

sent word that it had reached a verdict.

As the foreman announced the verdict of guilty on the first count in the crowded courtroom, there was "a tremendous outpouring of emotion," as the trial judge phrased it. "Mrs. Musto, the wife of one of the defendants, rose to her feet and broke into tears. As the foreman continued to read the verdict, she clutched at her husband . . . and continued to weep. Several of the female jurors, observing Mrs. Musto's reaction to the verdict, then betan to cry themselves. . . . Several relatives attempted to remove Mrs. Musto from the courtroom but she reacted by tightening her embrace of her husband and by continuing to cry hysterically." 540 F. Supp. at 328.

When announcement of the verdicts on all counts had been concluded, defense counsel requested a poll. The court informed the jurors that each of them would

be asked if he or she agreed with the verdict and that they should answer "yes" or "no." The first three jurors answered "yes," but Juror No. 4 said "no."

The district court's opinion describes the ensuing scene: "At this point, pandemonium broke out in the courtroom. Many supporters of the defendants who were present leapt to their feet screaming. People pounded on the benches of the courtroom and some of the defense attorneys pounded on their desks and shouted." Id. at 329. The trial judge then directed the jurors to resume deliberations. As the jury walked toward the exit, Juror No. 4 turned to the trial judge and said, "Your Honor, he held up his hand to stop her from saying more, and the jury left the courtroom.

The judge then met with counsel in chambers and detailed Juror No. 4's actions on the record, saying, "She obviously

wishes to communicate with the court in some way. I look to [counsel] for assistance." A spirited discussion followed for several minutes. The judge then asked counsel to review a note he proposed sending to the jury, asking whether Juror No. 4 wished to speak to the court or whether the jury wished to continue deliberations. Just as counsel reached agreement on the phrasing of the note, the court received one from the jury that read: "May we continue polling the jury?" The judge estimated that no more than 10 or 15 minutes had elapsed since the jury had left the courtroom.

One of the defense lawyers requested the judge to inquire in open court whether Juror No. 4 wished to see him. The judge refused and announced that the jury would be polled, beginning with Juror No. 1. Defense counsel objected to this sequence, contending that the polling should begin

with Juror No. 5.

Before beginning the second poll, the judge cleared the courtroom of all persons other than defendants, counsel and members of the press. He then reminded the jurors that each would be asked if he or she agreed or disagreed with "the verdict as announced by your foreperson." On the poll, each juror answered "yes."

After the polling was completed, the jury returned to the deliberation room while counsel presented motions. One of the defense lawyers said that Juror No. 4, "although she answered 'yes,' put her hands in the air and shrugged and was crying and shook her head and said 'yes' in a tone of resignation which I really did not have the impression represented her free will." Other counsel asked that the judge interview Juror No. 4 in the presence of counsel, but the court declined.

In his opinion, the trial judge referred to Juror No. 4's vote and said: "The poll did not reveal the juror's uncertainty with the verdict. Although Juror No. 4 made certain gesticulations at the time she indicated her agreement with the verdict, the court cannot conclude that those gestures indicated uncertainty with the decision." 540 F. Supp. at 342.

When the jury was recalled to the courtroom to be discharged, one defense attorney asked for another poll, this one as to each count. The trial court refused and dismissed the jury.

Defendants argue on this appeal that, after Juror No. 4 answered "no," a mistrial should have been granted or, in any event, further instructions should have been given at that point. They also contend that the second poll should not have begun with Juror No. 1, and that a valid

verdict was not recorded. Defendants are critical as well of the trial judge's failure to meet with Juror No. 4 before accepting the verdict and his refusal to interview her after the verdict was received. Finally, they assign error in the district court's refusal of a poll on each count.

The trial judge acted properly in requiring the jury to deliberate further after the aborted first poll. Fed.R. Crim. P. 31(d) provides that if there is not unanimous concurrence on a poll, "the jury may be directed to retire for further deliberation or may be discharged." The choice is a matter within the discretion of the trial judge, even if a motion for mistrial is made. United States v. Warren, 594 F. 2d 1046, 1049 (5th Cir. 1979). The trial judge is in a better position than an appellate court to determine the likelihood of an ultimate unanimous verdict

after a dissenting vote during a poll. His judgment, particularly after a lengthy trial such as this one, must be given proper deference. See United States v. Smith, 562 F. 2d 619, 622 (10th Cir. 1977).

Defendants did not request additional instructions before the jury left after the first poll, and in view of the emotionally charged atmosphere in the courtroom, the trial judge properly removed the jury from the scene as quickly as possible. Any other course of action would have risked further disruption of the trial in its concluding moments and possibility tainted the verdict.

We also find no error in the trial judge's decision not to speak with Juror No. 4 once he learned that the juror wished to resume polling. An interview at that stage would have been intrusive and might well have interfered with the jury's function. Moreover, the second

polling offered Juror No. 4 an opportunity to continue to dissent, if she so chose. By clearing the courtroom of spectators, the judge provided a much calmer ambience for the second poll.

We noted earlier that interviews with individual jurors are not to be encouraged, and that is particularly so in the circumstances present here. The trial judge's prudence was proper. As we observed in United States v. Lee, 532 F. 2d 911 (3d Cir.), cert. denied 429 U.S. 838 (1976), making inquiries of jurors threatens the secrecy of deliberations and invites charges of coercion and interference with the jury's function. See also United States v. Nelson, 692 F. 2d 83, 85 (9th Cir. 1982); United States v. Sexton, 456 F. 2d 961, 966 (5th Cir. 1972).

Defendants next argue that Juror No. 4's gestures indicated that she did not assent to the verdict. The trial judge,

however, wrote that "the court cannot conclude that these gestures indicated uncertainty with the decision." 540 F. Supp. at 342. We must rely upon the trial judge's appraisal of the circumstances.[6] It is particularly appropriate that we do so in this case where the trial was marked by the judge's scrupulous sense of fairness, his determination to observe the defendants' rights, and his continuing courtesy to counsel in difficult and exhausting circumstances.

---

[6] It is unfortunate that we must rely only on the recollections of some of those who witnessed the occurrences at the end of this case. With the advent of videotape, modern technology has made it possible to have speedy, inexpensive visual and audio recording of trials. As early as 1930, Judge Jerome Frank said that sound motion pictures should be made of trials. See United States v. Rubenstein, 151 F. 2d 915, 921 n. 5 (2d Cir.1945) (Frank, J. dissenting). See also, J. Frank, COURTS ON TRIAL 224 (Princeton Univ. Press 1945). Yet today when vastly improved methods are available, the courts must still depend on the techniques that were used a hundred years ago. See United States ex rel. Perry v. Mulligan, 544 F. 2d 674, 679 n. 3 (3d Cir. 1976).

We also reject the defendants' contention of error in beginning the second poll with Juror No. 1. The method of polling is entrusted to the discretion of the trial court. See United States v. Shepherd, 576 F. 2d 719, 722 n. 1 (7th Cir.), cert. denied 439 U.S. 852 (1978). There has been no demonstration of a misuse of that discretion here. Moreover, we have held it to be error for a trial judge to inquire into the numerical division of the jury when informed that a jury has been unable to reach a decision. Government of the Virgin Islands v. Gereau, 600 F. 2d 435 (3d Cir. 1979); see Brasfield v. United States, 272 U.S. 448 (1926). Had the trial judge continued the first poll after Juror No. 4 dissented, the numerical division of the jury would have been revealed. Once a juror has dissented from the verdict, there is no need for further polling and to continue the pro-

cess without the opportunity for further deliberation is erroneous. See United States v. Spitz, 696 F. 2d 916 (11th Cir. 1983) (per se error to continue polling).

The repolling in this instance obviously had to begin with Juror No. 1. A poll that omitted Juror No. 4 and left her dissent as a position of record would have impermissibly revealed the numerical division of the jury. The trial judge properly began the process anew.

We find no merit as well in the defendants' argument that the trial court erred in refusing their request for a poll on each count after the verdict was recorded. As we observed before, the manner in which a poll is conducted is within the discretion of the trial court. Moreover, "the power to repoll is also among the judge's discretionary powers." United States v. Morris, 612 F. 2d 483, 489 (10th Cir. 1979). Defendants have shown no

abuse of discretion here. See United States v. Lustig, 555 F. 2d 737 (9th Cir. 1977), cert. denied,434 U.S. 1045 (1978).

We also reject the defendants' contention that the district court should have held a post-verdict hearing on what Juror No. 4 wished to communicate to the court as she left the courtroom after the initial poll. As noted earlier, post-verdict inquiries of jurors are strongly disfavored and severely restricted. "This is to avoid harassment of jurors, inhibition of deliberation in the jury room, a deluge of post-verdict applications mostly without real merit, and an increase in opportunities for jury tampering; it is also to prevent jury verdicts from being made more undertain." King v. United States, 576 F. 2d 432, 438 (2d Cir. 1978). Defendants have not produced any grounds adequate to justify deviation in this case from the settled policy.

Finally, the defendants argue that because the jury's findings were not re-announced before the second polling began, there is no valid verdict. No objection to this effect was made at trial, and it is too late now to raise such a technical point. If defendants had a genuine concern about the problem, then they should have presented it to the trial judge when correction could easily have been accomplished. In any event, we are confident that the jurors knew precisely what they were doing when the trial judge began the second poll by directing their attention to the verdict that had previously been announced.

Accordingly, the judgments of the district court will be affirmed in all respects.

APPENDIX

Listing contentions raised and rejected but not discussed in opinion.

A. Contentions of all defendants:

1. The district court erred in limiting the testimony of an expert witness to a general discussion on the linguistic analysis of conversations and in not allowing him to apply that analysis to the specific tape recorded conversations introduced in this case.

2. The district court erred in permitting the jury to use transcripts of tape recordings during deliberations.

3. Reversal is required on the basis of cumulative error.

4. The law and facts of the case were too complext for the jury to render individualized and rational decisions.

B. Contentions raised by defendants Dentico and D'Agostino and joined in by defendant Aimone:

1. The district court abused its discretion in failing to sever any of the defendants or counts.

2. The district court erred in its handling of a post-trial hearing on, and in refusing to set aside the verdict on the basis of, an alleged social relationship between one of the jurors and the government's main witness.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM V. MUSTO, FRANK SCARAFILE, JOHN J. POWERS, LAWRENCE DENTICO, DOMINICK D'AGOSTINO, GILDO AIMONE, ANTHONY GENOVESE and JOHN BERTOLI,

Defendants.

June 3, 1982

Motion denied.

W. Hunt Dumont, U.S. Attorney by Maryanne T. Desmond, First Ass't U.S. Attorney, Sam Rosenthal, James Plaisted, Mark Malone; Richard Friedman, Ass't U.S. Attorney, Newark, New Jersey, for plaintiff.

Irving Anolik, New York City, New York, for defendant William V. Musto.

Dennis McAlevy, Hoboken, New Jersey, for defendant Frank Scarafile.

Shain, Hayden, Perle, Rafanello, Schaffer and Irish by Joseph Hayden, Newark, New Jersey, for defendant John J. Powers.

Thomas Ford, Milburn, New Jersey, for defendant Lawrence Dentico.

Podvey and Sachs by J. Barry Cocoziello, and Alan Silber, Newark, New Jersey for defendant Dominick D'Agostino.

Sills, Beck, Cummis, Radin and Tischman by Robert Baime, Newark, New Jersey, for defendant Gildo Aimone.

Flood and Basile by Raymond Flood, Hackensack, New Jersey, for defendant Anthony Genovese.

Robinson, Wayne, Greenberg, Levin, Riccio and LaSala by John D. Arseneault, Newark, New Jersey, for defendant John Bertoli.

SAROKIN, District Judge

Defendants, alleging irregularties in the selection process for grand and petit jurors and for grand jury forepersons and deputy forepersons, seek to have the indictment against them dismissed. All of the defendants are white males over the age of 35. They make two contentions: first, that Blacks and Hispanics have been historically underrepresented in the grand jury and petit jury arrays of this district, and second, that Blacks, women and persons under the age of 28 have been underrepresented in the positions of grand

jury foreperson and deputy foreperson. Defendants allege that the disproportionate represention of these groups in the arrays and in the foreperson and deputy foreperson positions violates the fifth and sixth amendments to the United States Constitution and the Jury Selection and Service Act of 1968, 28 U.S.C. §1861.

A hearing, lasting several days, was held to determine the validity of the defendants' factual allegations. The court received expert testimony on the methodology employed to establish the alleged diaparties in representation and on the statistical significance of the disparities found. The court also heard testimony from social scientists, the United States Attorney, and several employees of the District Court Clerk's office on the significance of the role of the foreperson.

STANDING

Although defendants are not members

of the classes purportedly excluded from either the grand and petit jury arrays or from the foreperson and deputy foreperson positions, they nevertheless claim that they have standing under the fifth and sixth amendments and under 28 U.S.C. §1861 to establish deficiencies in the juror and foreperson selection process. To determine whether a defendant has standing, the court must focus on whether the person whose standing is questioned is a proper party to request an adjudiciation of a particular issue and not on whether the issue itself is justiciable. Flast v. Cohen, 392 U.S. 83, 99-100, 88 S. Ct. 1942, 1952-53, 20 L. Ed. 2d 947 (1968). Resolution of this question is difficult because the same complexities and vagaries that generally inhere in other aspects of justiciability also surround questions of standing. Id. at 98, 88 S. Ct. at 1951. Nevertheless, analysis is simplified by

making two inquiries: whether the party alleges that the challenged action has caused him injury in fact, economic or otherwise; and whether the interest sought to be protected by the complainant is arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-53, 90 S. Ct. 827, 829-30, 25 L. Ed. 2d 184 (1970). These questions will be first considered with respect to defendants' sixth amendment claims.

The sixth amendment guarantees to all criminal defendants the right to a "speedy and public trial, by an impartial jury." U.S. Const. amend. VI. An essential characteristic of an impartial jury is that its members are drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 527, 95 S. Ct.

692, 696, 42 L. Ed. 2d 690 (1975). A defendant indicted by an unrepresentative grand jury, cf. United States v. Layton, 519 F. Supp. 946 (N.D. Cal. 1981), or convicted by an unrepresentative petit jury, Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), suffers injury because his constitutional and statutory rights to an impartial jury have been violated. The injury stemming from this defect in selection procedures casts doubt on the integrity of the judicial process. Therefore, a defendant has standing to challenge such violations under the sixth amendment even though he is not a member of the excluded or underrepresented class. Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 695096, 42 L . Ed. 2d 690 (1975).

Similarly, defendants have standing under the Jury Selection and Service Act of 1968, to challenge unrepresentative

grand or petit jury arrays. 28 U.S.C. §1867. Standing to assert irregularities under the Act does not depend on whether the defendant is a member of the excluded or underrepresented class. United States v. Marcano, 508 F. Supp. 462 (D. P.R. 1980). Thus, under both the sixth amendment and the Jury Selection and Service Act, defendants have standing to challenge the composition of grand and petit jury arrays.

Although defendants have standing to challenge the grand and petit jury arrays under the Constitution and under 28 U.S.C. §1867, the government contends that defendants do not have standing under either source of law to challenge the exclusion of constitutionally cognizable groups from the positions of foreperson or deputy foreperson. Standing is lacking, the government argues, because the foreperson's duties are purely ministerial and do

not have a significant impact on the fairness of the criminal justice system. Therefore, the values of a fair trial and of an untainted judicial process which underly sixth amendment challenges to the composition of jury arrays are not implicated where the claim of exclusion relates only to the foreperson or deputy foreperson positions.

The government's argument confuses standing with a disposition on the merits of defendants' claims. Defendants are contending that the institutional role of the foreperson is so substantial that the person filling the position has the power to alter the "unique qualities and characters of the jury's individual members." United States v. Jenison, 485 F. Supp. 655, 661-62 (S.D. Fla. 1979). If defendants succeed in proving that the foreperson position imbues its occupant with such overpowering influence, then it

follows that the systematic exclusion of cognizable groups from the position without justification disturbs the values underlying the fair cross-section requirements of the sixth amendment and of 28 U.S.C. §1861. Because sixth amendment values and the values underlying the Jury Selection and Service Act are arguably implicated by discrimination in the selection of forepersons, defendants have standing to proceed to the merits of their claim.

Although defendants have standing under the sixth amendment and under 28 U.S.C. §1861, to contest irregularities in the composition of the grand and petit juries and in the selection of grand jury forepersons and deputy forepersons, they do not have standing to assert similar fifth amendment equal protection violations. Standing is lacking under the fith amendment because defendants are not

members of an allegedly excluded class. In Castaneda v. Partida, 430 U.S. 482, 494, 97 S. Ct. 1272, 1280, 51 L. Ed. 2d 498 (1977), the court, considering a challenge to the grand jury array brought under the equal protection clause of the fourteenth amendment, stated:

> [I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs.

(emphasis supplied). The quoted language from Castaneda was cited with approval by the Court in Rose v. Mitchell, 443 U.S. 545, 565, 99 S. Ct. 2993, 3005, 61 L. Ed. 2d 739 (1979). In Rose, defendants, all of whom were Black, alleged that an equal protection violation had occurred with respect to the selection of grand jury forepersons. The Court found that a prima facie case of discrimination had not been proven and reversed the appellate court.

Defendants argue that Rose is not applicable here and instead urge that Peters v. Kiff, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972), is controlling. In Peters, the Court held that a defendant need not be a member of an excluded class in order to challenge the composition of the grand jury that indicted him. Because the defendant in Peters was convicted at a trial that took place before the sixth amendment was incorporated into the due process clause of the fourteenth amendment, the Court could not rest its decision on sixth amendment grounds. Instead, the Court held that under the due process clause, a criminal defendant, whatever his race, would have standing to challenge the selection system for grand or petit juries if members of any ra-e are arbitrarily excluded from service. Id. at 504, 92 S. Ct. at 2169. The Court reasoned:

> It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system or how that jury would have decided the case. Consequently, it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty. In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.

Id. (citations omitted).

Although the Court in Peters applied standing principles liberally under the due process clause, it specifically refused to consider defendants' equal protection claims. Id. at 497 n. 5, 92 S. Ct. at 2165 n. 5. Here, defendants' fifth amendment claim is asserted on equal protection grounds. Although the fifth amendment has no equal protection clause, it does forbid discrimination that is so

unjustifiable as to be violative of due process. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2, 95 S. Ct. 1225, 1228 n. 2, 43 L. Ed. 2d 514 (1975). Thus, where fifth amendment equal protection claims have been raised they have been approached in precisely the same way as equal protection claims under the fourteenth amendment. Id. A classification invalid under the equal protection clause of the fourteenth amendment then, will also be invalid under the due process clause of the fifth amendment. United States v. Gordon-Nikkar, 518 F. 2d 972, 976 (5th Cir. 1975).

The approach of various courts to fourteenth amendment equal protection claims has been to require that the defendant be a member of the excluded class before his standing to assert the claim will be recognized. See, e.g., Castaneda v. Partida, 430 U.S. 482, 494, 97 S. Ct.

1272, 1280, 51 L. Ed. 2d 498 (1977). In a recently decided case, however, United States v. Perez-Hernandez, 672 F. 2d 1380 1386 (11th Cir. 1982), the Eleventh Circuit held that a defendant had standing under the fifth amendment to allege discrimination in the selection of grand jury forepersons even though the defendant himself was not a member of the class allegedly excluded. This conclusion was premised on the court's reading of Peters v. Kiff as an equal protection case. The court found that because the holding of Peters "is clear and unambiguous and has never been expressly overruled," defendant had standing to assert a fifth amendment challenge to the selection of forepersons. This court agrees that the holding of Peters is "clear and unambiguous," but it is clearly and unambiguously premised on due process, not equal protection. The Court in Peters specifically stated:

> Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

407 U.S. at 504, 92 S. Ct. at 2169. (emphasis supplied). The Supreme Court hus found that the defendant in Peters had standing to challenge irregularities in the selection of grand jurors on due process grounds and not, as the Eleventh Circuit has found, on equal protection grounds. This was recognized by Justice Rehnquist in Duren v. Mississippi, 439 U.S. 357, 373, 99 S. Ct. 664, 673. 58 L. Ed. 2d 579 (1979), where in a dissent critical of Peters he stated: "Because the white defendant [in Peters] lacked standing to raise an equal protection challenge to the systematic exclusion of blacks from jury duty, the Court was forced to turn to the due process clause of the fourteenth amendment." In fact, as noted previously,

the Court in Peters itself, noted that it was not considering defendant's claims that his own rights under the equal protection clause had been violated. 407 U.S. at 497 n. 5, 92 S. Ct at 2165 n. 5.

In alleging that underrepresentation of cognizable groups in the jury selection process violates the equal protection clause, defendants are not really asserting the rights of the excluded jurors. Under "pure standing" principles, therefore, defendants would not have standing to assert an equal protection violation. Nevertheless, the court must still consider whether defendants have jus tertii, or third party standing. Under the concept of jus tertii, a third party who suffers "injury in fact" has standing "to assert the constitutional rights of others where it would be difficult for the persons whose rights are asserted to protect themselves adequately by presenting

their own grievance before an appropriate court." Tribe, American Constitutional Law, §3-26. In deciding whether to apply third party standing principles, courts generally examine three factors: "the importance of the relationship between claimant and rightholders, the ability of rightholders to vindicate their own rights, and the risk that the rights of third parties will be diluted." Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 441 (1974).

Defendants argue that Peters provides white defendants with standing to allege the violation of the constitutional rights of the excluded jurors. This argument, however, is premised on a misinterpretation of the case. In Peters, the defendant's own due process rights had been violated because he was denied a jury which was representative of the community. True, in asserting his rights, the de-

fendant vindicated the integrity of the judicial process, but, if anything, this weakens the argument that standing must be conferred on defendants here, who are asserting equal protection violations. First, if the injury alleged is one to the integrity of the judiciary, then an action under the sixth amendment or under the Jury Selection and Service Act is available to redress the wrong.

Secondly, if the injury alleged is the stigma suffered by a member of the excluded class, injunctive relief is available to the class member under the fifth amendment, cf. Brown v. Rutter, 139 F. Supp. 679 (W.D. Ky. 1956), or, if indicted, the excluded individual may also on equal protection grounds seek a dismissal of the charges. Cassell v. Texas, 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839 (1950). Because the injured party can seek for himself or herself a remedy for

the alleged wrong, there is no justification for extending jus tertii principles to the facts of this case.

The court therefore concludes that a defendant does have standing to assert a fifth amendment equal protection challenge if he is not a member of the allegedly underrepresented class. Beal v. Rose, 532 F. Supp. 306, 309-10 (M.D. Tenn. 1981). See Guice v. Fortenberry, 633 F. 2d 699, 703 (5th Cir. 1980); United States v. Cross, 516 F. Supp. 700, 706 (M.D. Ga. 1981). Defendants here do not belong to the classes claimed to be underrepresented, and therefore lack standing to assert these claims.

MERITS OF DEFENDANTS' CLAIMS

Identification of Constitutionally Cognizable Classes

To establish a prima facie violation of the fair-cross-section re-

quirement,[1] the defendant must show that (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to the systematic exclusion of the group in the jury-selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579 (1979). Defendants have the burden of proof on each of these elements. United States v. Butler, 611 F. 2d 1066, 1069 (5th Cir.) cert. denied 449 U.S. 830, 101 S. Ct. 97, 66 L. Ed. 2d 35 (1980).

---

[1] The "fair cross section" of 28 U.S.C. §1861 is the functional equivalent of the "reasonably representative" standard of the Constitution. Therefore, the tests for showing underrepresentation under the Constitution and the statute are the same. United States v. Test, 550 F. 2d 577, 584-85 (10th Cir. 1976).

In considering a sixth amendment violation, the focus is on the issue of a fair cross section of the community and not on the issue of discrimination. United States v. Jenison, 485 F. Supp. 655, 660 (S.D. Fla. 1979). Therefore, a defendant is not required to prove bad faith, and a prima facie showing of systematic exclusion may not be rebutted by proof of non-discriminatory intent. Id. It is also irrelevant that the exclusion of constitutionally cognizable groups was unintentional. United States v. Holman, 510 F. Supp. 1175 (N.D. Fla. 1981). Once the defendants have made a prima facie showing of substantial underrepresentation the state may only rebut the prima facie case by showing that a significant state interest is advanced by the procedure which results in the exclusion. Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

Defendants contend that Blacks and Hispanic Americans have been underrepresented in the grand and petit jury arrays. These ethnic groups, defendants argue, are distinctive classes within the meaning of the test set forth above in Duren. Although there is no fixed definition of what constitutes a distinct group, factors which courts examine include:

> (1) the presence of some quality or attribute which 'defines and limits' the group; (2) a cohesiveness of 'attitudes or ideas or experience' which distinguishes the group from the general social milieu; and (3) a 'community of interest' which may not be represented by other segments of society.

United States v. Test, 550 F. 2d 577, 591 (10th Cir. 1976).

It is firmly established that Blacks, Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879), and women, Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), are constitutionally cognizable classes.

It is less clear, however, that Hispanic Americans are a distinct class. Defendants label as Hispanic any person who has identified himself or herself on the juror qualification form as being of Spanish, Latin, Hispanic, Cuban or other Central or South American ethnicity. A similar grouping was rejected as overly broad in United States v. Rodriguez, 588 F. 2d 1003, 1007 (5th Cir. 1979), where the Fifth Circuit affirmed a magistrate's report, which stated:

> there [is] simply no evidence upon which this Court could base a finding that persons of such diverse national origins as Cubans, Mexicans, and Puerto Ricans possess such similar interests that they constitute a cognizable group.

Although this court has doubts that defendants' definition of Hispanics meets constitutional standards for the identification of cognizable classes, it will nevertheless assume for purposes of analysis that the definition is appropriate.

See United States v. Gordon-Nikkar, 518 F. 2d 972 (5th Cir. 1975); United States v. De La Rosa, No. 80-276, slip op. (D. Mass. January 16, 1981).

The court cannot, however, accept defendants' contention that persons aged 18 to 27 constitute a cognizable class. The persons within this proposed class neither share interests which may not be represented by other segments of the social milieu nor share attitudes or experiences unique from the rest of society. Other courts, also reaching this conclusion, have held that young persons are not a cognizable or distinctive class under the Jury Selection and Service Act or under the Constitution for purposes of challenging jury arrays. See, e.g., United States v. Potter, 552 F. 2d 901, 909 (9th Cir. 1977); United States v. Test, 550 F. 2d 577, 593 (10th Cir. 1976); United States v. Ross, 468 F. 2d 1213,

1217 (9th Cir. 1972), cert. denied, 410 U.S. 989, 93 S. Ct. 1500, 36 L. Ed. 2d 188 (1973).[2]

THE STATISTICAL CASE[3]

Grand and Petit Jury Arrays

Defendants contend that although Blacks comprise 13 per cent of the voting

---

2 Defendants urge that United States v. Butera, 420 F. 2d 564 (1st Cir.1970) requires this court to recognize young persons as constituting a cognizable class. In Butera, however, the class was composed of persons aged 18 to 35; here, the class consists of persons aged 18 to 27. Moreover, other courts which have considered whether young persons constitute a cognizable class have specifically rejected the reasoning of Butera. See e.g., United States v. Potter, 552 F. 2d 901, 905 (9th Cir. 1977).

Defendants also contend that Ciudadanos Unidos de San Juan v. Hidalgo County, 622 F. 2d 807, 818-19 (5th Cir. 1980), cert. denied 450 U.S. 964, 101 S. Ct. 1479, 67 L. Ed. 2d 613 (1981) requires recognition of young people as constituting a cognizable class. In that case, however, the court found that the county plans in issue before it were distinguishable from the above-cited decisions which dealt with challenges brought under the federal grand jury statutes.

3 The court has used 1980 census statistics in analyzing defendants' prima facie case. These statistics differ little from the 1970 statistics and do not alter the result that would be obtained by using the earlier statistics.

age population[4], they account for only 7.6 per cent of the persons in the jury pool from which grand and petit juries are chosen. Statistically, this variation can be expressed as either an absolute disparity of 5.4 per cent or a comparative disparity of 41.5 per cent. The absolute disparity measures the absolute difference between the percentage of the cognizable class in question in the eligible population and the percentage of the same group within the master wheel. United States v. Facchiano, 500 F. Supp. 896, 898 (S.D. Fla. 1980). The comparative disparity, on the other hand, measures the result

---

[4] Because only those persons 18 years of age or older are eligible for jury service, 28 U.S.C. §1865, it is appropriate to define the community in terms of the voting age population. See, e.g., United States v. Perez-Hernandez, 672 F. 2d 1380, 1383 (11th Cir. 1982); United States v. Test, 550 F. 2d 577, 582-83 (10th Cir. 1976).

obtained by dividing the absolute disparity by the percentage of the cognizable class in question in the eligible population. Id. at 899 n. 7. To illustrate, if Blacks comprised 60 percent of the eligible population and 50 percent of the jury wheel, then the absolute disparity would be -10 percent [50 percent minus 60 percent], and the comparative disparity would be -16.6 percent [10 percent divided by 60 percent].

Where the eligible population in issue is relatively low, the comparative disparity will magnify the difference. Id. at 899. In Smith v. Yeager, 465 F. 2d 272, 279 n. 18 (3d Cir.) cert. denied 409 U.S. 1076, 93 S. Ct. 685, 34 L. Ed. 665 (1972), the Third Circuit, recognizing that the comparative measure may distort reality, stated:

> However, the comparative approach reaches absurd results in cases like Dow v. Carnegie-Illinois Steel Corp.,

> 224 F. 2d 414 (3d Cir. 1955), cert. denied, 350 U.S. 971, 76 S. Ct. 442, 100 L. Ed. 842 (1956), which considered racial discrimination in the Western District of Pennsylvania, where the Negro population at the time was 4.4% of the total, and Negro jury participation ranged as low as 2% of the jury list.

Similarly, the Eighth Circuit, in United States v. Whitley, 491 F. 2d 1248, 1249 (8th Cir.), cert. denied, 416 U.S. 990, 94 S. Ct. 2399, 40 L. Ed. 2d 769 (1974), recognized the weaknesses of the comparative measure:

> The defendant characterizes the deviation in comparative terms and says that it exceeds 80%. While such a characteristic may be proper where Blacks constitute a significant proportion of the population, it is ordinarily inappropriate where a very small proportion of the population is black. A comparative characterization in such circumstances distorts reality.

Id. at 1249. (citations omitted). See also, United States v. Butler, 611 F. 2d 1066, 1070 (5th Cir.), cert. denied 449 U.S. 830, 101 S. Ct. 97, 66 L. Ed. 2d 35 (1980).

Because Blacks in this district comprise a relatively small percentage of the eligible jury population, the court will focus on the absolute disparity to determine whether defendants have proven a prima facie violation of the fair-cross-section requirement of the Jury Selection and Service Act and the sixth amendment. The absolute disparity here is 5.4 per cent. This is not sufficient to establish a prima facie case of underrepresentation. In Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), where equal protection violations were alleged, the Supreme Court held that a prima facie case of discrimination had not been shown where there was underrepresentation of an identifiable group by as much as 10 per cent. Although Swain was an equal protection case, other courts have held that an absolute disparity of 10 per cent or

less, is insufficient to prove the prima facie elements of a fair-cross-section claim. United States v. Maskeny, 609 F. 2d 183, 190 (5th Cir.), cert. denied, 447 U.S. 921, 100 S. Ct. 3010, 65 L. Ed. 2d 1112 (1980); United States v. Test, 550 F. 2d 577, 587 (10th Cir. 1976). This court agrees with the reasoning of those courts and therefore finds that defendants have not established a prima facie case of underrepresentation of Blacks on the grand jury and petit jury arrays.

Similarly, defendants have not shown that Hispanics have been underrepresented in the grand and petit jury arrays. Defendants contend that American citizens of Hispanic descent[5] comprise 5.3 per cent

---

[5] The community has been defined as consisting of American citizens of Hispanic descent because it is only citizens who have a right to vote and therefore serve as jurors. Even if the community is expanded, however, to include, as defendants suggest, all Hispanics, the difference does not aid defendants' prima facie case. See infra.

of the voting age population in this district yet account for only 1.1 per cent of the jury pool. There is thus an absolute disparity of 4.2 per cent and a comparative disparity of 79.2 per cent.[6] Because Hispanics comprise a small percentage of the eligible population and because the absolute disparity is under 10 per cent, the court, again, finds that the prima facie elements of a fair-cross-section violation have not been proved.

Defendants contend that because voter registration lists are used to establish the jury pool from which grand and petit juries are chosen, Hispanics will never be fairly represented on juries in this district. This conclusion is drawn for two reasons: first, many Hispanics

---

[6] The absolute and comparative disparities set forth in the statistician's supplemental affidavit of October 9, 1981 have been adjusted to correct an arithmetic error in the affidavit. The adjustment, however, has no effect on defendants' prima facie case.

in the community, although citizens, have not registered to vote; and, second, many resident Hispanics are not citizens. Therefore, defendants argue that even though only citizens may serve on juries, 28 U.S.C. §1865(b)(1), the fair-cross-section requirement of 28 U.S.C. §1863(b)(3) is satisfied only when there is reflected in the arrays the percentage of all Hispanics in the district, voting and non-voting, and citizen and non-citizen. Defendants urge that a fair cross-section can be obtained only by supplementing the lists from which jurors are drawn.

Defendants' argument is misplaced. In United States v. Lewis, 472 F. 2d 252 (3d Cir. 1972), the Third Circuit held that the use of voter registration lists was a constitutionally acceptable method of selecting jurors. The court stated:

> [A] group of persons who choose not to vote do not constitute a 'cognizable group.' Further, their non-registra-

> tion is a result of their own inaction; not a result of affirmative conduct by others to bar their registration. Therefore, while fairer cross section of the community may have been produced by the use of 'other sources of names,' the Plan's sole reliance on voter registration lists was constitutionally permissible.

Id. at 256. (emphasis in original). If non-voting citizens are not a cognizable class, aliens a fortiori are not a cognizable group. See United States v. Gordon-Nikkar, 518 F. 2d 972, 977-78 (5th Cir. 1975). Moreover, even if the court were to accept defendants' contention that the relevant population is the entire Hispanic community, a prima facie case of underrepresentation still would not have been shown. Hispanics comprise 8.6 per cent of the population in this district and 1.1 per cent of the jury pool is Hispanic. Therefore, the absolute disparity is only 7.5 per cent and is insufficient to establish a violation of the fair-cross-section standard.

Forepersons and Deputy Forepersons

Defendants contend that from April 1976 to July 1981, judges in this district selected 25 grand jury forepersons and 25 deputy forepersons. Of this number, two forepersons and two deputy forepersons were Black. Blacks of voting age comprise 13 per cent of this district's population. Therefore, as to both forepersons and deputy forepersons, there is a five per cent absolute disparity. A disparity of such low magnitude is insufficient to establish a prima facie showing of underrepresentation. Cf. Swain v. Alabama, 380 U.S. 202, 208, 85 S. Ct. 824, 829, 13 L. Ed. 2d 759 (1965).

A stronger showing has been made, however, with respect to the underrepresentation of women. Of the 25 forepersons and 25 deputy forepersons selected over the five-year period, only two forepersons and three deputy forepersons were female.

In this district, women comprise 52 per cent of the voting age population. Therefore, as to forepersons, the absolute disparity is 44 per cent and the comparative disparity is 84.6 per cent, and, as to deputy forepersons, the absolute disparity is 40 per cent and the comparative disparity is 77 per cent. If forepersons were selected at random, the chances are less than one out of 10,000 that only three of the 25 persons selected for the deputy foreperson position would be female if the process were purely random.

Although defendants have offered strong proof that women have been underrepresented in the foreperson and deputy foreperson positions in this district, the government alleges that defendants' proofs are flawed. The government first contends that the size of the sample used is too small to establish statistically significant disparities. In support of

this contention, the government cites Rose v. Mitchell, 443 U.S. 545, 99 S. Ct. 2992, 61 L. Ed. 2d 739 (1979). In Rose, defendants alleged that for the period 1951-1973 there was discrimination in the selection of state grand jury forepersons. Although the period under scrutiny in Rose was substantially longer than the five-year period examined here, defendants in Rose were unable to adduce proof that no Black had served as foreperson for several of the years in question. Id. at 571, 99 S. Ct. at 3008. In addition, there was no proof as to the total number of foremen appointed during the period examined. Id. The Court noted, however, that the state forepersons were appointed for two-year terms and could be reappointed to additional terms without limitation. The Court therefore concluded that too few persons served as forepersons during this critical period for statistically signifi-

cant inferences to be drawn. Id. at 571-72, 99 S. Ct. at 3008.

Here, the situation is significantly different. Defendants have examined jury records over a five-year period and have accounted for each person chosen to serve as foreperson or deputy foreperson at the time of each grand jury's empanelment. Statisticians testified that the sample drawn was large enough to allow statistically significant conclusions to be drawn. Although the government urges that in some cases the individual selected to serve as foreperson did not serve for the life of the grand jury, it has not offered sufficient proof to challenge the accuracy of defendants' data. Moreover, Rule 6(c) of the Federal Rules of Criminal Procedure provides that the deputy foreperson shall serve as foreperson during the foreperson's absence. It is therefore reasonable to assume that if the

foreperson leaves the grand jury permanently, he or she will be replaced by the deputy. Here, even if every foreperson resigned and were replaced by the deputy, there would be only five females among the 50 persons who, at some time, occupied the position. Thus, there would be a 42 per cent absolute disparity. In addition, if the court were to assume that there was turnover in the foreperson position only on those grand juries where there were women deputy forepersons, then only five of the 28 persons who occupied the foreperson position would be female. In that case, there would be a 34.2 per cent absolute disparity. The court therefore finds that even were it to accept the government's contention that there has been turnover in the foreperson position after initial selections have been made, it cannot conclude, without further proof, that defendants prima facie case is affected.

The government also contends that it is inappropriate to measure disparities in the jury arrays or in the foreperson position by using the entire voting age population as a statistical base. Instead, the government argues that the relevant community for measuring disparities in the array consists of those persons eligible for jury service, and the relevant community for determining underrepresentation in the foreperson position consists of those persons eligible to serve as foreperson.[7] Although some refinement in the statistics used to

---

[7] The government's contention that the composition of the group of forepersons should be measured against the composition of the grand jury arrays instead of the general voting age population misses the gist of defendants' argument. Defendants are contending that the forepersons are not representative of the community at large. If defendants' argument has merit, then it is the general voting age population which forms the relevant community.

establish the relevant community might yield more accurate results, courts have accepted general population statistics as appropriate for measuring disparities in the jury arrays, Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977) or in the foreperson position. United States v. Perez-Hernandez, 672 F. 2d 1380, 1383 (11th Cir. 1982). Therefore, the court finds that use of the voting age population is an acceptable means of defining the community against which disparities are measured.

Finally, the government, through its cross-examination of defendants' statistical expert, suggests that it is inappropriate to group together the forepersons selected by seven different judges acting independently of each other. Defendants' statistician testified, however, that such a grouping was mathematically appropriate. Moreover, the Jury

Selection and Service Act declares that all litigants have a right to grand and petit juries drawn from a fair cross-section of the community "in the district or division where the court convenes." 28 U.S.C. §1861. Defendants' contention that forepersons in this district have not been representative of the community is premised upon rights conferred by the Act. Defendants' argument, therefore, is not that forepersons are underrepresentative of the grand juries from which they are drawn, but instead that forepersons are not representative of the population in the district. Other courts, considering identical challenges, have found it acceptable to group together for the forepersons selected by the judges of the district in which the challenge was made and to measure variations against the general population of the district. See e.g., United States v. Perez-Hernandez,

672 F. 2d 1380, 1383 (11th Cir. 1982); United States v. Breland, 522 F. Supp. 468 (N.D. Ga. 1981); United States v. Manbeck, 514 F. Supp. 141 (D.S.C. 1981); United States v. Holman, 510 F. Supp. 1175 (N.D. Fla. 1981); United States v. Jenison, 485 F. Supp. 655 (S.D. Fla. 1979). This court agrees that it is appropriate to combine into one group all of the forepersons selected by the judges of this district from April 1976 to July 1981. Such a grouping is arguably consistent with the policies underlying the sixth amendment and the Jury Selection and Service Act. Therefore, because the government has failed to convince the court that there are deficiences in the methodology employed by defendants to prove that women have been underrepresented in the foreperson position, the court finds that a prima facie statistical case has been proven.

Significance of the Foreperson and Deputy Foreperson

Although defendants have demonstrated that women have been underrepresented in the foreperson and deputy foreperson positions, the court must still determine whether the positions are of such significance that an unjustified exclusion of women must result in the dismissal of the indictment. Under Rule 6(c) of the Federal Rules of Criminal Procedure, the foreperson and deputy foreperson are appointed by the court. The Rule provides that the foreperson has the power to administer oaths, to sign indictments, to keep a record of the number of jurors concurring in the finding of every indictment or to appoint another juror to keep such a record, and to file the record with the clerk of the court. In this district, the foreperson also asks witesses to produce records, requests witnesses to submit to examination, and excuses wit-

nesses after examination is complete. The duties of the foreperson are therefore purely ministerial. United States v. Cross, 516 F. Supp. 700 (M.D. Ga. 1981). Nevertheless, defendants contend that the administrative responsibilities of the foreperson and the appointment of the foreperson by the judge in the presence of other jurors, confer upon the occupant of the position power and influence not held by other jurors. This added power and influence, defendants argue, translates into between three to five votes. Therefore, under defendants' reasoning, even if the grand jury arrays in this district are mirror images of the community, the fair-cross-section requirement is disturbed by the appointment of an excessive number of males as forepersons.

In support of this theory, defendants adduced testimony of social psychologists, who testified that the foreperson is per-

Pages misnumbered in original copy

ceived by other jurors as having special influence. This influence derives from several bases of social power identified by social psychologists. The types of power include: legitimate power, through which the person within the group grants the leader the right to influence him or her; expert power, through which the leader is seen to have special knowledge; information power, through which the leader is seen as having special information about the specific case; and coercive power, through which the leader has control of reward and punishment for the group and its members.

Dr. John McConahay, a social psychologist, testified that when the judge, who is viewed by the jury as being neutral, knowledgeable in the law, fair and just, chooses a foreperson in the presence of the other jurors, he confers upon the person selected legitimacy. The fore-

person's legitimate power is then enhanced by his performing purely ministerial acts, such as administering oaths and signing indictments.[8] This legitimate power of the foreperson, it is contended, also results in the attribution to him of other bases of social power. For example, other members of the jury may perceive that the foreperson is an expert because he is selected by another perceived expert, the judge.

---

[8] Defendants also sought to prove that the foreperson had other powers in addition to those designated in Rule 6(c), including the power to excuse other jurors in emergencies, to question witnesses before the other jurors have an opportunity to do so, to initiate discussions during deliberations, and to return the indictment to the judge or magistrate in open court. These additional responsibilities were outlined in a model charge supplied to the judges of this district by the Clerk's office. Although an official from the Clerk's office testified that the charge was read by the judge to the grand jury, she was unable to say whether it was read in its original form or was modified by each judge. Defendants have therefore failed to prove that additional responsibilities outlined in the charge were conferred upon all forepersons in the district. Thus the court cannot accept defendants' contentions that these added responsibilities contributed to the foreperson's power.

Although Dr. McConahay's findings may have some support in the literature of social psychology, they cannot be accepted by this court. Dr. McConahay testified that he had never served on a grand jury, been present while a grand jury conducted its business, been present at an empanelment, heard a grand jury instructed, seen a foreperson selected, or participated in any way whatsoever in the business of a grand jury. In fact, Dr. McConahay's only direct knowledge of the way in which grand juries function was through a reading of a transcript of grand jury proceedings in Florida and the deposition of a single grand jury foreperson in an unrelated action, who testified that he

Defendants also contend that grand juries of this district meet in a room where the foreperson occupies an elevated seat, similar to a judge's bench. This seating arrangement, it is argued, enhanced the perceived power of the foreperson. Because all grand juries did not use the specially designed room, the court cannot rely upon such evidence in arriving at its findings of fact and conclusions of law.

sought to control other grand jurors.

The acts of the foreperson studied by Mr. McConahay in his review of the Florida transcript were strictly those relating to the federal foreperson's interrogation of witnesses. The practice in this district, however, according to the testimony of former United States Attorney William Robertson, is to have the grand jurors direct their questions through the prosecuting attorney. Therefore, because the foreperson in this district does not directly interrogate witnesses, the transcript studied by Dr. McConahay has little relevance here. In addition, Dr. Conahay's study of the deposition testimony is of questionable relevance. Although the foreperson testified that he sought to control other jurors, Dr. McConahay could not say whether the foreperson was evidencing leadership behavior because of his position or whether the foreperson was

asserting control over other jurors to fill his own psychological needs. The court, therefore, cannot conclude that Dr. McConahay's study of the foreperson's deposition is of any relevance here.

Although the court eannot conclude from the testimony adduced at the hearing that the foreperson position is of constitutional significance, defendants urge that the Supreme Court's decision in Rose v. Mitchell, 443 U.S. 545, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) compels this conclusion as a matter of law. In Rose, the four defendants, all of whom were Black, alleged that their due process rights were violated because there had been a pattern of discrimination in the selection of Tennessee grand jury forepersons. The Court held that defendants had not proven a prima facie statistical case and dismissed their claims. In a footnote, however, the Court stated:

> In view of the disposition of this case on the merits, we may assume without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire.

Id. at 551-52 n. 4, 99 S. Ct. at 2998 n.4. (emphasis supplied) (citations omitted).

Although the Court's statement in Rose was merely dictum, it has been relied upon by courts which have concluded that the foreperson occupies a constitutionally significant position. See, e.g., United States v. Perez-Hernandez, 672 F. 2d 1380, 1386 (11th Cir. 1982) (foreperson significant under fifth amendment); Guice v. Fortenberry, 661 F. 2d 496, 499 (5th Cir. 1981) (foreperson significant under fifth amendment); United States v. Breland, 522 F. Supp. 468, 478 (N.D. Ga. 1981) (foreperson significant under fifth amendment); United States v. Manbeck, 514 F. Supp. 141, 148 (D.S.C. 1981) (forperson signifi-

cant under fifth amendment); United States v. Holman, 510 F. Supp. 1175, 1178 (N.D. Fla. 1981) (foreperson significant under fifth and sixth amendments); United States v. Jenison, 485 F. Supp. 655, 661 (S.D. Fla. 1979) (foreperson significant under fifth amendment). This court believes that this reliance is misplaced. First, as already noted, the Court's language in Rose was merely dictum. Second, and most importantly, Rose involved a challenge to Tennessee grand jury forepersons, whose responsibilities are different from those of federal grand jury forepersons. See United States v. Cross, 516 F. Supp. 700, 704-05 (M.D. Ga. 1981). In Tennessee, for example, the foreperson is not selected from a randomly drawn venire but instead appointed by the judge from the public at large. The foreperson is selected for a term of two years and is often reappointed for additional terms. In Rose, one

foreperson had served for five or six years, and another had served for several years in addition to substituting for the regular foreperson during times of illness. The federal grand jury foreperson, on the other hand, serves for no more than 18 months.[9] Fed.R. Crim.P. 6(g), and is selected by the judge from a randomly drawn group. Therefore, there is much greater likelihood that in Tennessee the grand jury foreperson will be perceived by the other jurors as an expert than there is in the federal system.

In Rose, the Court described other duties of the grand jury foreperson under the laws of Tennessee:

> He or she is charged with the duty of assisting the district attorney in investigating crime, may order the

---

[9] Under Rule 6(g), a grand jury may serve for a maximum of 18 months. Although it is conceivable that the foreperson could be randomly selected to serve again as a grand juror, and subsequently be appointed foreperson for a second time, such an event is highly unlikely.

> issuance of subpoenas for witnesses before the grand jury, may administer oaths to grand jury witnesses, must endorse every bill returned by the grand jury, and must present any indictment to the court in the presence of the grand jury. The absence of the foreman's endorsement makes an indictment 'fatally defective.'

Id., 443 U.S. at 548 n. 2, 99 S. Ct. at 2996 n. 2.

In contrast, in this district the questioning of witnesses is generally done by the United States Attorney, and the grand jury foreperson has no subpoena power. In addition, federal courts have recognized that the failure of the federal foreperson to discharge his duties is not fatal to the validity of the indictment. Therefore, where the foreperson failed to keep a record of those persons concurring in the indictment, United States v. Parker, 103 F. 2d 857, 860 (3d Cir.), cert. denied, 307 U.S. 642, 59 S. Ct. 1044, 83 L. Ed. 1522 (1939), or failed to sign an indictment, Frisbie v. United States, 157 U.S.

160, 15 S. Ct. 586, 39 L. Ed. 657 (1895); cf. United States v. Long, 118 F. Supp. 857, 860 (D. P.R. 1954), the indictment was not invalidated. Because the federal foreperson's duties are less substantial than the Tennessee foreperson's, there is less danger that the federal foreperson will have special influence over the deliberative process of the grand jury. See United States v. Cross, 516 F. Supp. 700, 705 (M.D. Ga. 1981). For the foregoing reasons, the court finds that the decision in Rose does not require this court to conclude that the position of federal grand jury foreperson is one of constitutional significance.

In so holding, the court is not unmindful of the Fifth Circuit's recent decision in Guice v. Fortenberry, 661 F. 2d 496 (5th Cir. 1981). In Guice, the court stated, "If convictions must be set aside because of the taint of the grand

jury, we see no reason to differentiate the result because discrimination affected only the foreman." Id. at 499. Guice, however, involved a fourteenth amendment equal protection challenge to Louisiana grand jury forepersons by two Black defendants. Sixth amendment claims were not asserted in the case. In addition, in declaring the foreperson position one of constitutional significance, the court followed the dictum of Rose v. Mitchell, without elaboration. Here, the court has held that white defendants do not have standing to allege fifth amendment equal protection violations with respect to the foreperson position. Therefore, the only question before the court is whether under the sixth amendment and the Jury Selection and Service Act forepersons occupy positions of significance. The decisions of other courts, holding that for equal protection purposes, forepersons occupy con-

stitutionally significant positions are thus not applicable here. An equal protection violation is substantially different from a fair-cross-section violation. In equal protection matters, the focus is on purposeful discrimination. United States v. Maskeny, 609 F. 2d 183, 190 (5th Cir.), cert. denied, 447 U.S. 921, 100 S. Ct. 3010, 65 L. Ed. 2d 1112 (1980). In fair-cross-section cases, however, the focus is not on discriminatory conduct but instead is on whether the jury selection system is impartial and will yield a microcosm of the community which can fairly represent the views of all persons within the society. Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). Therefore, to prove in a fair-cross-section case that the foreperson occupies a position of constitutional significance, the values underlying the fair-cross-section requirement must be tainted

by the underrepresentation of cognizable classes in the position. Here, this has not been demonstrated. Defendants have not shown that the foreperson has the power to alter the "unique qualities and characters of the jury's individual members." United States v. Jenison, 485 F. Supp. 655, 661-62 (S.D. Fla. 1979).

Recently, in United States v. Perez-Hernandez, 672 F. 2d 1380 (11th Cir. 1982), the Eleventh Circuit also agreed that under the sixth amendment the foreperson's role is not one of constitutional significance. The court reasoned that because the foreperson alone could not represent the divergent views of the community, the position was not of special importance. Id. at 1385. Although this court agrees with the Eleventh Circuit's conclusion, it differs from the Circuit Court's reasoning. Defendants do not contend that the foreperson, by himself or

by herself, represents a cross-section of the community. Rather, defendants argue that the foreperson has one viewpoint and that this viewpoint has greater influence in the deliberative process than the viewpoints of other jurors. It is therefore disproportionate influence of the foreperson that taints sixth amendment values and not that the foreperson represents many viewpoints. Here, the court finds, however, that the foreperson does not have disproportionate influence in the deliberative process. Therefore, the position is not of constitutional significance.

In United States v. Cabrera-Sarmiento, 533 F. Supp. 799 (S.D. Fla. 1982), the court also concluded that the foreperson position was not one of significance under the sixth amendment:

> When a group as a whole is excluded or significantly underrepresented on a jury, the defendant is denied the attitudes, experiences, outlook, and accumulated wisdom of that group. The relevance of the similar question to the

> office of foreperson, however, is not so clear. Assuming a fair cross-section on the jury as a whole, the defendant enjoys the richness of the community's general make-up, even where certain groups are underrepresented as forepersons. The benefit of the fair cross-section to the defendant is destroyed only if the 'impact of the grand jury foreperson is so substantial as to influence or alter the unique qualities and characteristics of the jury's individual members.

Id. at 808 (citations omitted).

This court concludes that sixth amendment values and the policies underlying the Jury Selection and Service Act are not disturbed where jury arrays are representative of the community yet there is underrepresentation in the foreperson position. If defendants had demonstrated that the law has created a position which endows persons selected as forepersons with such overpowering influence that the views of other jurors are diminished substantially during the deliberative process, then there would be cause for concern that the values under-

lying the fair-cross-section requirement were being threatened. No such proof has been offered, however, that convinces the court that the foreperson's role is of such great significance. Although the foreperson may be clothed with legitimacy because he or she is appointed by the court, it does not necessarily follow that the foreperson will dominate deliberations or that his or her views will receive greater weight that the views of the other grand jurors. Individuals beside the foreperson may have power. Some individuals have power because they are charismatic, others have power because they have expertise in a given area, and still others have power because they have pleasant or domineering personalities. The fair-cross-section requirement does not contemplate that all persons serving on juries or on grand juries will have equal influence. The standard only con-

templates that the juries will be representative of the communities from which they are drawn. Here, there has been no showing that the jury arrays are deficient.

The grand jury process is an essential part of our criminal justice system. It removes from the hands of the prosecution the right to determine who shall and who shall not be prosecuted. Because of its importance, most of the concepts which mandate the representative character of petit juries have been applied to grand juries as well.

The determination of whether a person should be put to trial and the trial itself are to be judged by jurors which represent a fair cross-section of the community. A failure to convene representative juries may deprive a person of fundamental constitutional rights.

It is for this reason that the selection of juries and forepersons must care-

fully be scrutinized so that the balance created by random selection will not be undone. However, in our desire to protect the integrity of the system we must not be quick to find an imbalance where none exists. Grand jury forepersons are selected from a group of persons who themselves represent a fair cross-section of the community. The mere selection of that person by the court does not alter the representative character of the grand jury.

Defendants seek a dismissal of the indictment fairly returned by a properly constituted grand jury. Before this court should set aside the facts of such a revered body, the justification should be clear and the need manifest. There is nothing before this court which would justify it holding that the selection of grand jury forepersons by the jugdges of this court rendered the grand juries

unrepresentative or caused an imbalance on the scales of justice.

For these reasons the motion to dismiss the indictment on the grounds asserted are denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5290, 82-5297/98, 82-5304/5/6/7
and 82-5511/12

(D.C. Criminal Nos. 81-144/01/02/
03/05/06/07/08)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF NEW JERSEY

Present: ADAMS and WEIS, Circuit Judges,
and VAN ARTSDALEN, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel May 11, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered May 13, 1982 in Criminal Nos. 81-144-07, 81-14405, 81-144-06, 81-144-01, 81-144-02, 81-144-03, and

* Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

81-144-08, appealed here respectively at Nos. 82-5290, 82-5297, 82-5298, 82-5304, 82-5307, 82-5306, and 82-5307; and from the Orders of the said District Court entered August 10, 1982 in Criminal Nos. 81-144-05 and 81-144-06, appealed here respectively at Nos. 82-5511 and 82-5512, be, and the same are hereby affirmed.

ATTEST:

Sally Mrvas

Clerk

August 25, 1983

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5290, 82-5297/98,
82-5304/5/6/7, 82-5511/12

UNITED STATES OF AMERICA

v.

AIMONE, GILDO,

Appellant in No. 82-5290

UNITED STATES OF AMERICA

v.

DENTICO, LAWRENCE,

Appellant in Nos. 82-5297 and 82-5511

UNITED STATES OF AMERICA

v.

D'AGOSTINO, DOMINICK,

Appellant in Nos. 82-5298 and 82-5512

UNITED STATES OF AMERICA

v.

MUSTO, WILLIAM V.

Appellant in No. 82-5304

UNITED STATES OF AMERICA

v.

SCARAFILE, FRANK,

Appellant in No. 82-5305

UNITED STATES OF AMERICA

v.

POWERS, JOHN J.,

Appellant in No. 82-5306

UNITED STATES OF AMERICA

v.

GENOVESE, ANTHONY,

Appellant in Nos. 82-5307

SUR PETITION BEFORE REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges, and VAN ARTSDALEN, District Judge.*

The petition for rehearing in banc of appellants LAWRENCE DENTICO and DOMINICK D'AGOSTINO in the above entitled case

---

* The Honorable Donald W. Van Artsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Gibbons did not participate in the consideration of this matter.

BY THE COURT,

Joseph F. Weis, Jr.

Circuit Judge

Dated: September 19, 1983

Supplemental Brief

No. 83-681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE DENTICO and
DOMENICK D'AGOSTINO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM M. KUNSTLER
Kunstler & Mason
13 Gay Street
New York, New York 10014
(212) 924-5661

Attorney for Petitioners

Dated: May 16, 1984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE DENTICO and
DOMENICK D'AGOSTINO,

Petitioners.

VS.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PREFATORY STATEMENT

This supplemental brief to Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit is filed and served pursuant to Rule 22.6, Rules of the Supreme Court of the United States.

ARGUMENT

It has been brought to the attention of Petitioners' counsel that, during the oral argument in *Wilbur Hobby v. United States of America*, No. 82-2140, on April 25, 1984, counsel for petitioner therein emphasized the inherent supervisory power

of the Court over what petitioners herein believe to be the more significant Due Process, Equal Protection, Sixth Amendment and Grand Jury Clause violations relied upon by them in their Petition for Certiorari. In view of the fact that this Court's decision in *Hobby* may well affect the disposition of their Petition, which is apparently being held pending the resolution of *Hobby*, petitioners want to reiterate that, in their opinion, the constitutional issues advanced by them, as well as by the American Civil Liberties Union in its Brief, Amici Curiae, are at least as significant as that of this Court's inherent supervisory power.

Accordingly, unless *Hobby* is resolved favorably to the Petitioner therein, in a manner applicable to petitioners herein, they respectfully request the opportunity to brief and argue fully the aforesaid constitutional issues before this Court.

CONCLUSION

Petitioners' pending Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted unless *Wilbur Hobby v. United States of America*, No. 82-2140, presently pending in such a manner as to be equally applicable to those herein or otherwise resolved in terms applicable to the favorable resolution of the within petition.

Respectfully submitted,

WILLIAM M. KUNSTLER
Kunstler & Mason
13 Gay Street
New York, New York 10014
(212) 924-5661

Attorney for Petitioners

Dated: New York, New York
May 16, 1984

Brief for the United States

Nos. 83-681, 83-690 and 83-806

In the Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE DENTICO and DOMINICK D'AGOSTINO,
PETITIONERS

v.

UNITED STATES OF AMERICA

WILLIAM V. MUSTO, FRANK SCARAFILE and
JOHN J. POWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

DOMINICK D'AGOSTINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
JANIS H. KOCKRITZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED *

1. Whether alleged discrimination in the selection of grand jury forepersons resulting in the underrepresentation of women in that position provides a basis for reversal of a conviction upon an indictment returned by the grand jury.

2. Whether petitioners were denied a fair trial by incidents that occurred during the jury deliberations and polling.

3. Whether the district court infringed petitioner Musto's right of confrontation by limiting cross-examination of a key government witness and whether a consent recording made by that witness violated Musto's Fourth Amendment rights.

4. Whether the district court properly limited testimony by an expert linguist intended to show that a key government witness had "orchestrated" a taped conversation.

5. Whether the district court properly sent transcripts of taped conversations into the jury room during the course of deliberations.

---

* See page 13 note 14, *infra*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-681

LAWRENCE DENTICO and DOMINICK D'AGOSTINO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 83-690

WILLIAM V. MUSTO, FRANK SCARAFILE and JOHN J. POWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 83-806

DOMINICK D'AGOSTINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

1. Nos. 83-681 and 83-690

The opinion of the court of appeals (83-681 Pet. App. 1a-47a; also 83-690 Pet. App. A1-A23) is reported at 715 F.2d 822.[1] The opinion of the district court denying petitioners' motion to dismiss the indictment because of alleged discrimination in foreperson selection (Pet. App. 48a-111a) is reported at 540 F. Supp. 346. The opinion of the district court denying petitioners' post-trial motions seeking relief based upon events that occurred during jury deliberations and polling is not reported in either of the petition appendices, but is reported at 540 F. Supp. 318.

2. No. 83-806

The court of appeals' unpublished judgment order appears at 83-806 Pet. App. A1-A2. The transcript of the district court's oral order denying petitioner's motion to dismiss the indictment based on alleged discrimination in foreperson selection is reproduced at 83-806 Pet. App. A3. By that order, the district court adopted as its own, the district court's opinion addressing this issue in *United States* v. *Musto*, 540 F. Supp. 346, that is reproduced at 83-681 Pet. App. 48a-111a.[2]

---

[1] Unless otherwise indicated, references to "Pet. App." hereinafter are to the appendix to the petition for a writ of certiorari in No. 83-681.

[2] In the district court, the prosecution addressed in Nos. 83-681 and 83-690 was styled *United States* v. *Musto*.

JURISDICTION

1. Nos. 83-681 and 83-690

The judgment of the court of appeals (Pet. App. 112a-113a; also 83-690 Pet. App. A25-A26) was entered on August 25, 1983. Petitions for rehearing were denied on September 19, 1983 (Pet. App. 115a-116a; 83-690 Pet. App. A27-A28). The petition for a writ of certiorari in No. 83-681 was filed on October 24, 1983, and that in No. 83-690 was filed on October 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

2. No. 83-806

The judgment of the court of appeals (83-806 Pet. App. A1-A2) was entered on September 27, 1983, and a petition for rehearing was denied (83-806 Pet. App. A6-A7) on October 21, 1983. The petition for a writ of certiorari was filed on November 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Nos. 83-681 and 83-690

Following denial of their motion to dismiss the indictment based upon alleged discrimination in the selection of grand jurors and grand jury forepersons and an ensuing jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), in violation of 18 U.S.C. 1962(d); engaging in a pattern of racketeering, in violation of 18 U.S.C. 1962(c); various mail and wire fraud offenses, in violation of 18 U.S.C. 1341 and 1343; extortion, in

violation of 18 U.S.C. 1951;[3] interstate travel in aid of illegal activity, in violation of 18 U.S.C. 1952; and investing the proceeds from racketeering activities in enterprises affecting interstate activities, in violation of 18 U.S.C. 1962(a).[4] Petitioners Musto, Scarafile and Powers were also convicted of income tax fraud. Petitioners Dentico and D'Agostino were sentenced to terms of imprisonment of 10 years and 8 years, respectively, and each was fined $50,000. Petitioners Musto, Powers and Scarafile were all sentenced to seven years' imprisonment. The court of appeals affirmed the convictions.

1. The evidence presented at trial, the sufficiency of which is not in dispute, showed that petitioners Dentico and D'Agostino, together with Thomas Principe, Rudolph Orlandini and the Orlando Construction Company formed a criminal enterprise that was advanced by Dentico and D'Agostino through their control of the construction company and other related entities created to oversee construction projects in Union City and North Bergen, New Jersey. Petitioners Musto, Scarafile, and Powers were local public officials in Union City who accepted bribes in return for using their authority and influence in furtherance of the enterprise's affairs.[5] The public official petitioners were shown to have awarded con-

---

[3] Petitioners Dentico and D'Agostino were not charged with extortion.

[4] Petitioners Musto and Scarafile were not charged with these offenses.

[5] Musto was the mayor of Union City and also a member of the New Jersey Senate. Scarafile was the deputy chief of police of Union City. Powers was president of the Union City Board of Education.

struction contracts and tax abatements to projects in which the enterprise was interested, and to have arranged for payment to be made for the benefit of the enterprise upon fraudulent work orders. The city officials were also demonstrated to have cooperated with the enterprise in its scheme to sell an office building to Union City at a grossly inflated price. Pet. App. 5a-9a.

2. Prior to trial, petitioners moved to have the indictment dismissed, claiming that blacks and Hispanics had historically been underrepresented in grand and petit jury arrays in the District of New Jersey, and that blacks, women and persons under the age of 28 had been underrepresented in the position of grand jury foreperson and deputy foreperson. Petitioners rested their claims upon the Fifth and Sixth Amendments and the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* Pet. App. 49a-50a.

a. An evidentiary hearing was held in connection with these claims. As it pertains to the foreperson selection issue, the evidence indicated that 25 grand juries had been impaneled in the Northern Division of the District of New Jersey during the period April 1976 through July 1981. In this period, two forepersons and two deputy forepersons were black; two forepersons and three deputy forepersons were female; the balance were white males (Pet. App. 81a-82a).[6]

---

[6] According to census data cited by the district court, 13% of the voting age population of the district was black and 52% female (Pet. App. 81a-82a). The evidence showed that 7.6% of the persons in the jury pool were black (Pet. App. 73a). The percentage of females in the jury pool or on the grand jury apparently is not disclosed in the record. See Pet. App. 86a & n. 7.

It was petitioners' contention that the responsibilities of the foreperson, coupled with the appointment of the foreperson by the court in the presence of the other grand jurors, confer upon the foreperson an extra measure of power and influence that could be translated into three to five votes on the grand jury (see Pet. App. 91a). To support their claim that the position of foreperson is sufficiently significant to warrant dismissal of an indictment based upon a showing of statistical underrepresentation of women or minorities in that post, petitioners presented the testimony of a social psychologist, Dr. John McConahay. Dr. McConahay suggested that the judge's appointment of the foreperson in open court conferred upon him a "selected legitimacy" which, petitioners contended, led the jurors to perceive the foreperson to be "an expert." Pet. App. 93a-94a. In his testimony, Dr. McConahay also relied upon a certain handbook of grand jury operating procedures (11/12/81 Tr. 115), and upon the deposition of a former grand jury foreman from Florida, who indicated that as foreman he had attempted to control the other jurors (Pet. App. 95a-96a; 11/12/81 Tr. 111-112). Petitioners did not seek to subpoena any of the judges of the district court to inquire as to their foreperson selection procedures and criteria (see C.A. Supp. App. 217-223).

The government challenged the testimony of Dr. McConahay on cross-examination. Dr. McConahay acknowledged that he had never served upon a grand jury, been present at an empanelment, heard a grand jury instructed or been present while a grand jury was in session. Nor did he know whether the grand jury handbook he relied upon was used in the District of New Jersey, or whether the single foreman whose

deposition was introduced had been successful in attempting to control his fellow grand jurors. Pet. App. 95a-96a; 11/12/81 Tr. 115. The government presented the testimony of the United States Attorney that grand jury forepersons in the District of New Jersey did not directly question witnesses. Rather, the Assistant United States Attorney handles the questioning and forepersons direct their questions through the prosecutor. In addition, the record indicated that the grand jury foreperson did not decide, independently of the grand jury, whether or when to issue subpoenas. Pet. App. 96a, 101a.

b. The district court denied the motions to dismiss (Pet. App. 48a-111a). The court held that petitioners, white males, have standing to challenge the grand and petit jury arrays under the Sixth Amendment and the Jury Selection and Service Act, and to challenge on Sixth Amendment grounds the underrepresentation of blacks or other groups in the position of grand jury foreperson (Pet. App. 50a-56a). However, the district court held that, as non-members of the groups allegedly subject to discrimination, petitioners had no standing to press an equal protection challenge to foreperson selection procedures (Pet. App. 56a-66a). On this point, the district court emphasized that petitioners' "fifth amendment claim is asserted on equal protection grounds" (Pet. App. 59a). The court accordingly distinguished *Peters* v. *Kiff*, 407 U.S. 493 (1972), which upheld the standing of a white defendant to challenge, upon due process and statutory grounds, the exclusion of blacks from a jury.

Applying a Sixth Amendment fair cross-section analysis, the district court recognized blacks and women as distinctive groups in the community cog-

nizable for purposes of challenges to jury composition and grand jury foreperson selection. The court also assumed, arguendo, that Hispanics are cognizable as a separate class, but held that persons between the ages of 18 and 27 are not cognizable as a separate class. Pet. App. 66a-72a.

The district court rejected petitioners' challenges to the grand and petit jury arrays, concluding that the statistical evidence did not establish a prima facie fair cross-section violation based on underrepresentation of blacks or Hispanics (Pet. App. 72a-80a). The court similarly concluded that the statistical evidence did not establish a prima facie violation with respect to representation of blacks among grand jury forepersons (Pet. App. 81a). But the court concluded that the statistics reflected significant underrepresentation of women among forepersons and deputy forepersons (Pet. App. 81a-89a).

The district court nonetheless found no sufficient basis for dismissal of petitioners' indictment, concluding that the foreperson does not exercise disproportionate influence in the deliberative process, and that underrepresentation of women among forepersons does not frustrate the values protected by the Sixth Amendment fair cross-section requirement, so long as the grand jury as a whole is properly constituted (Pet. App. 90a-111a). The district court emphasized the ministerial character of the duties assigned to the foreperson by Fed. R. Crim. P. 6(c), and of the other duties performed by the foreperson by custom in the District of New Jersey (Pet. App. 90a-91a, 96a, 101a-102a). Dr. McConahay's testimony was given little weight because it was not grounded in "direct knowledge of the way grand juries function" (Pet. App. 95a).

The court concluded (Pet. App. 110a-111a):

> [Petitioners] seek a dismissal of the indictment fairly returned by a properly constituted grand jury. Before this court should set aside the facts of such a revered body, the justification should be clear and the need manifest. There is nothing before this court which would justify it holding that the selection of grand jury forepersons by the jugdges [sic] of this court rendered the grand juries unrepresentative or caused an imbalance on the scales of justice.

The case then proceeded to trial. Petitioners were convicted upon the jury's verdict and sentenced.[7] The district court rejected a variety of motions for post-trial relief based upon incidents that occurred during jury deliberations and polling. *United States* v. *Musto*, 540 F. Supp. 318 (D. N.J. 1982).

3. The court of appeals affirmed (Pet. App. 1a-47a). The only issue raised on appeal pertaining to jury composition was the alleged underrepresentation of women among grand jury forepersons in the District of New Jersey. The court of appeals assumed, without deciding, that petitioners' statistical evidence established a prima facie case of underrepresentation of women in the post (see Pet. App. 11a n.3). But the court of appeals also agreed with the district court's assessment that forepersons exercise insufficient influence over the deliberative process of the grand jury to warrant dismissal of an indictment returned by a properly constituted grand jury because of a pattern of underrepresentation of women among forepersons (Pet. App. 10a-18a). The court

---

[7] Additional facts pertaining to the trial proceedings, the jury's deliberations and the rendition of the verdict are set forth, as appropriate, in responding to the various questions presented for review in this Court.

noted that its decision was in accord with the Ninth Circuit's in *United States* v. *Coletta*, 682 F.2d 820 (1982), cert. denied, No. 82-798 (Feb. 22, 1983), and the Fourth Circuit's in *United States* v. *Hobby*, 702 F.2d 466 (1983), cert. granted, No. 82-2140 (Dec. 12, 1983). The court recognized the contrary decision in *United States* v. *Cross*, 708 F.2d 631 (11th Cir. 1983), petition for cert. pending, No. 83-1037 (filed Dec. 22, 1983), noting that forepersons in the Middle District of Georgia, whose role was considered there, apparently perform somewhat broader functions than forepersons in the District of New Jersey (Pet. App. 16a-17a). But the court also stated a more fundamental disagreement with the Eleventh Circuit (Pet. App. 17a):

> In any event, we are not persuaded that the duties performed by a federal [grand jury] foreperson confer the power to control the decision-making process of the grand jury.[8]

---

[8] On appeal, petitioners premised their challenge to foreperson selection in the District of New Jersey not only upon the Sixth Amendment, and an equal protection theory under the Fifth Amendment, but also upon a due process theory under the Fifth Amendment. Petitioners complained that the district court had erroneously failed to recognize their due process argument in rejecting their Fifth Amendment claim on standing grounds. The government argued that petitioners had not preserved any Fifth Amendment due process claim. The court of appeals did not directly address this dispute. Nor did it address the government's argument, accepted by the district court, that petitioners lacked standing to assert an equal protection claim based upon discrimination against women in foreperson selection. Rather, although the court's opinion is not wholly explicit, it appears that the court of appeals bypassed all of these threshold arguments, ruling that underrepresentation of women among forepersons does not justify dismissal of an indictment upon *any* constitutional theory.

The court of appeals also rejected petitioners' other contentions raised on appeal. These included claims that the indictment charged unrelated conspiracies as a single offense (Pet. App. 18a-23a), and a variety of allegations that the district court mishandled several incidents that occurred at trial during jury deliberations, rendering the verdict, and polling of the jury (Pet. App. 23a-45a) (see pages 15-17, *infra*). A number of petitioners' claims, including most of those raised in this Court, were deemed too insubstantial to warrant discussion by the court of appeals, and were simply enumerated in an appendix to the court's opinion (see Pet. App. 10a, 46a-47a).

B. No. 83-806

After denial of his motion to dismiss the indictment and an ensuing jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of interstate transportation of stolen checks, in violation of 18 U.S.C. 2314 and 2,[9] and was sentenced to five years' imprisonment and fined $10,000.[10] The court of appeals affirmed by unpublished judgment order (83-806 Pet. App. A1-A2).

1. The evidence at trial, the sufficiency of which is not challenged, established that petitioners, along with

---

[9] At trial, petitioner was acquitted by the district court on one count charging interstate travel to promote extortion, in violation of 18 U.S.C. 1952, and was acquitted by the jury on one count charging conspiracy to use extortionate means to collect a debt, in violation of 18 U.S.C. 894.

[10] The sentence imposed is to run consecutively to the sentence received by petitioner D'Agostino in the separate prosecution that underlies his petition in No. 83-681.

Salvatore Briguglio, Thomas Principe, and others,[11] needed investment money for the construction of a casino in Las Vegas, Nevada. To raise the necessary funds, they extorted money from Joseph and Charles Anastasie, two Philadelphia contractors. The Anastasie brothers were reluctant to invest with the men because of their reputed ties to the Genovese crime family. Briguglio, business agent for Teamsters Union Local 560, threatened the Anastasie brothers with "union problems" if they did not invest in the project, and petitioner, Briguglio, and Principe physically threatened them as well. Thus intimidated, Joseph Anastasie, who had just returned home following open heart surgery, gave Principe a check for $250,000, and Charles Anastasie turned over a check for an additional $50,000. Petitioner, Briguglio, and Principe returned with the checks to New Jersey, where petitioner described the techniques used to intimidate the Anastasie brothers to an associate in boastful terms.[12]

2. Prior to trial, petitioner moved to dismiss the indictment, based, inter alia, upon alleged discrimination in the selection of grand jury forepersons. The district court agreed to consider this motion on the basis of the pleadings and the testimony adduced in connection with the identical motion made by petitioner and his co-defendants in the RICO prosecution based on corrupt dealings with Union City, New Jersey, officials, that underlies the petition in Nos. 83-681 and 83-690. The district court denied the

---

[11] Briguglio was murdered in 1978. Principe disappeared prior to trial (Tr. 717).

[12] See Tr. 55, 78-79, 108, 145-147, 153-154, 192, 219, 222, 226-228, 232, 238, 243-247, 255-256, 393-395, 402-404, 410-414, 651, 854-855.

motion to dismiss from the bench, adopting the district court's opinion in the earlier case as its own (83-806 Pet. App. A5). The court of appeals affirmed by unpublished judgment order, rejecting without discussion petitioner's claim that the indictment should be dismissed because of discrimination in the selection of forepersons (83-806 Pet. App. A1-A2).[13]

ARGUMENT

Petitioners raise a plethora of issues, some of which were not raised in the court of appeals.[14] Because the question whether alleged discrimination against women in the selection of grand jury forepersons provides any basis for dismissal of an indictment returned by a properly constituted grand jury or for reversal of an ensuing conviction is pending before the Court in *Hobby* v. *United States*, cert.

---

[13] Although the court of appeals did not explicitly rely upon its earlier decision on this issue affirming the convictions of petitioners in Nos. 83-681 and 83-690, the judgment order entered on this appeal was rendered promptly after the denial of the petitions for rehearing in the prior case.

[14] Question 1 is presented by all three petitions addressed in this response. Questions 2-5 are presented only in No. 83-690, although petitioners in No. 83-681 purport to join in No. 83-690 to the extent it raises issues they do not address (see 83-681 Pet. 8-9). We note that Sup. Ct. R. 19.4 provides no authority for the unorthodox suggestion of the petitioners in Nos. 83-681 and 83-690 that they "join" in the petition in *Hobby* v. *United States*, cert. granted, No. 82-2140 (Dec. 12, 1983), to the extent it raises a question relating to alleged discrimination against blacks in foreperson selection. And because all of the petitioners limited their argument in the court of appeals to discrimination against women (see 83-681 Pet. App. A7), they cannot by this device place any broader claim before the Court.

granted, No. 82-2140 (Dec. 12, 1983), it would be appropriate to hold these petitions for disposition in light of a decision in *Hobby*.[15] The remainder of the

---

[15] A copy of our brief at the petition stage in *Hobby* setting forth our position that that case and the Third Circuit decisions below were correctly decided, has been provided to counsel for petitioner.

It could be argued that there is no necessary conflict between the decisions below and the Eleventh Circuit decisions that petitioners cite (82-681 Pet. 14-15) as conflicting. Petitioners have placed primary reliance upon a Sixth Amendment fair cross-section theory that even the Eleventh Circuit has rejected, see *United States* v. *Perez-Hernandez*, 672 F.2d 1380, 1385 (1982), whereas the claim sustained by the Eleventh Circuit is arguably a due process claim that petitioners, in the government's view, failed to raise in the district court (see page 10 note 8, *supra*). The court of appeals, however, did not rely upon petitioners' failure to preserve a due process claim, and did not reach the question whether petitioners had standing to present an equal protection claim, holding instead that petitioners are not entitled to dismissal of their indictment on any constitutional theory. See page 10 note 8, *supra*.

Nor does the fact that petitioners in Nos. 83-681 and 83-806 explicitly present a Sixth Amendment claim in this Court (see 83-681 Pet. 1; 83-806 Pet. 1) suggest that plenary consideration is warranted in this case in addition to *Hobby*. As indicated in our brief acquiescing in *Hobby*, the petitioner there has relied upon a similarly imprecisely stated melange of arguments, and the question presented in this Court is stated in broad terms. Thus there is little reason to believe that a decision in *Hobby* will not control the common issue in these cases. We note that the course suggested here, holding these petitions for *Hobby*, is the same one we have suggested in our petition for a writ of certiorari in *United States* v. *Cross*, No. 83-1037, which raises the same issue as these cases and *Hobby*. We do not perceive any basis for granting the motion of petitioners in No. 83-690 for "consolidation" of this case with *Hobby*.

issues raised in No. 83-690 (see note 13, *supra*) are wholly fact-bound and do not warrant further review.

1.a. Petitioners in No. 83-690 object to the district court's actions and rulings after a single juror gave a negative response when the jury was polled after the verdict was initially announced (83-690 Pet. 11-28).[16] The court of appeals' comprehensive opinion, on which we rely, carefully reviewed this factually unique course of events and properly rejected petitioners' claims (Pet. App. 38a-45a).

As the court noted, the district court's decision to require further deliberations was plainly appropriate in the circumstances (Pet. App. 38a-39a). Given the circumstances and the defendants' failure to request instructions to the jury more elaborate than those given at the moment when the jury was ushered back

---

[16] After the verdict was announced, during the course of a poll of the jury, the fourth juror answered "no" to the question whether the verdict that had been announced was her own. In the ensuing pandemonium, the court instructed the jury to resume deliberations. As the jury walked towards the exit, the recanting juror attempted to speak to the judge, but he held up his hand to stop her from saying more. Several minutes later, just as the court and counsel had reached agreement upon the contents of a note to be sent to the jury regarding this sequence of events, the jury sent a note asking for resumption of polling. The court thereupon began the poll anew, rejecting defense requests that the court first ask the fourth juror whether she wished to speak with the court and that the polling begin with the fifth juror. When the second poll reached the fourth juror, she responded "yes," while making certain gestures. The district court later concluded that these gestures did not indicate failure to assent to the verdict and declined to interview juror No. 4. After the jury was recalled to the courtroom to be discharged, one defense attorney asked for a poll as to each count. The court refused this request and dismissed the jury. Pet. App. 32a-37a.

out of the courtroom, the district court's instructions at this juncture cannot reasonably be faulted. Moreover, when the jury indicated that it had reached unanimity before the court could transmit an inquiry as to the need for further contact, the court properly declined to interview juror No. 4 before the polling resumed. Such an interview could easily have intruded upon the province of the jury and its absence did not prevent juror No. 4 from expressing her true views in the ensuing poll. The district judge was also best situated to determine whether the manner in which juror No. 4 assented to the verdict when polling was resumed warranted exploration. See Pet. App. 39a-45a. Finally, the decision whether to poll a jury on each count of the verdict is entrusted to the discretion of the district court. Petitioners have shown no abuse here; none of the events that underlie their contentions provides any particular reason to think that repolling of the jury in this manner would have yielded any different result. See Pet. App. 43a-44a.

b. Petitioners' argument (83-690 Pet. 29-30) that, when one juror became upset during the course of deliberations, the district court should have determined whether deliberations could lawfully continue with a jury of 11, or else ordered a mistrial, is insubstantial.[17] None of the defense counsel were will-

[17] On the third day of deliberations, the district court received a message that one of the jurors was crying because she was distressed at the separation from her husband required by sequestered deliberations. With consent of counsel, the court discussed the matter with the juror alone and off the record and learned that she was upset by certain pressures on the deliberations imposed by the foreperson. The court reported the conversation to counsel who agreed that the juror should not be excused and that the court should meet with the

ing to proceed with 11 jurors (see note 17, *supra*). Although some advocated a mistrial, others urged that deliberations continue. The course followed by the district court scrupulously protected the rights of petitioners, and no prejudice to petitioners is demonstrable, for there was no basis for declaring a mistrial. See Pet. App. 26a-32a.[18]

2. Petitioners contend (83-690 Pet. 31-42) that the trial court precluded effective cross-examination of Rudolph Orlandini, the chief government witness, and that Orlandini's surreptitious recording of conversations between himself and petitioner Musto violated Musto's Fourth Amendment rights. However, petitioner never raised these issues in the court below, and the court of appeals accordingly did not address them. See Pet. App. 10a, 46a-47a. Having failed to present his arguments to the lower court, petitioner should not be permitted to raise them now,

---

juror a second time. At the second meeting, the court told the juror that he would talk to the foreman about his functions. At first, the juror responded that she did not wish to continue to serve, but, after a third meeting with the judge, she indicated that she would be willing to remain. Defense counsel thereafter proposed several alternative courses of action: some moved for a mistrial, others wanted the juror to remain and another requested a hearing. None wanted to substitute an alternate juror or proceed with 11 jurors. The court and counsel then held a brief voir dire of the juror in chambers; she responded that she would continue and be impartial. The jury continued deliberations after supplemental instructions on the role of the foreperson in deliberations were given. No counsel objected to the juror's continuing deliberations after the voir dire. Pet. App. 23a-26a.

[18] Because substitution of an alternate juror was not sought by any defendant, and was not ordered by the district court, there is no occasion to consider in this case whether Fed. R. Crim. P. 23(b) authorized that measure.

for the first time, in this Court. See, *e.g.*, *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 2-9.[19]

3. Petitioners next maintain (83-690 Pet. 42-45) that the district court erred in limiting opinion testimony by a linguist, intended to show that Orlandini had "orchestrated" the aforementioned taped conversations so as to make petitioners' innocent conversation appear inculpatory. The district court, however, set no limits upon the linguist's testimony as to the principles applicable, in his view, to assessment of the taped conversations. The court merely declined to allow him to apply these views to the actual taped dialogue. The district court plainly did not abuse its discretion by limiting this expert testimony. As the district court explained, determination of the meaning of statements made in dialogue is not outside the realm of common experience and there was no reason to believe the testimony excluded would have assisted the jury (Musto C.A. App. 232a, 234a, 235a). The court of appeals deemed petitioner's contention unworthy of discussion (see Pet. App. 46a). Plainly this fact-bound ruling warrants no further review.

4. Petitioners argue (83-690 Pet. 45-48), finally, that the trial court erred in honoring the jury's request that transcripts of the taped conversations be sent into the jury room for its use during deliberations. This contention was properly rejected by the court of appeals without discussion (Pet. App. 46a). It is generally recognized that a trial court has the discretion to give the jury copies of transcripts for

---

[19] Among the questions presented listed in No. 83-690 (at ii) is whether petitioner Musto should have been granted a severance. No separate argument is made in support of the contention that a severance was required, nor did petitioner raise this claim in the court of appeals.

use in their deliberations. See *United States* v. *Sutherland*, 656 F.2d 1181, 1200 n.15 (5th Cir. 1981); *United States* v. *Koska*, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971); *United States* v. *Dorn*, 561 F.2d 1252, 1257 (7th Cir. 1977). In petitioners' case, the accuracy of all the transcripts was either stipulated or determined in a pretrial hearing. Before the transcripts were provided to the jury, the court properly instructed the jury that the evidence before them was the tapes themselves and that the transcripts were to be used only as an aid in listening to the tapes during deliberations. Petitioners did not seek supplemental instructions in this connection, and therefore may not complain that further instructions should have been given. In these circumstances, the district court's actions entailed no abuse of discretion.

CONCLUSION

The Court should dispose of these petitions in light of its decision in *Hobby* v. *United States*, No. 82-2140.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
JANIS H. KOCKRITZ
Attorneys

DECEMBER 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 439882 213